2

REPORTS OF CASES

DETERMINED IN THE

SUPREME COURT OF APPEALS

OF

WEST VIRGINIA,

FROM NOVEMBER 11, 1899, TO APRIL 14, 1900.

BY

ROMEO H. FREER,

ATTORNEY GENERAL AND EX OFFICIO REPORTER.

VOL. XLVII.

CHARLESTON:
THE TRIBUNE COMPANY,
1901.

JUDGES

OF THE

SUPREME COURT OF APPEALS

DURING THE TIME OF THESE REPORTS.

MARMADUKE H. DENT, *President.*

JOHN W. ENGLISH.

HENRY BRANNON.

HENRY C. McWHORTER.

ATTORNEY GENERAL AND EX-OFFICIO REPORTER,

ROMEO H. FREER,

CLERK,

JAMES A. HOLLEY.

PRINTED BY ORDER OF THE COURT.

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ERRATA.

On page 10, second line from bottom of page, for "and that the" read "and that at the."

On page 32, line five, the word "therefore" should read "therefor."

On page 82, line 18 from bottom of page, the word "litignats" should read "litigants."

On page 566, point 5 of Syllabus (last line), for "ability" read "individually."

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OF THE

SUPREME COURT OF APPEALS,

OF WEST VIRGINIA.

CHARLESTON.

RORER *v.* PEOPLE'S BUILDING, LOAN & SAVINGS ASSOCIATION.

Submitted June 23, 1899—Decided November 11, 1899.

1. CIRCUIT COURT—*Jurisdiction.*

   Where the circuit court of a county is without jurisdiction under any of the clauses of section 1, chapter 123, Code amended by chapter 46, Acts 1897. it cannot obtain jurisdiction by reason of service of process in any other county, except as against a railroad, canal, turnpike, telegraph or insurance company. (p. 2.)

2. JUDGMENT BY DEFAULT.

   A judgment by default, rendered without jurisdiction, under chapter 123, Code, amended by chapter 46, Acts 1897, is void, and may be vacated on motion. (p. 3.)

Error to circuit court, Mercer County.

Bill by P. H. Rorer against the People's Building, Loan & Savings Association. Judgment for plaintiff, and defendant brings error.

Reversed.

J. W. VANDERVORT, for plaintiff in error.

M. ANDERSON, for defendant in error.

DENT, PRESIDENT:

P. H. Rorer, assignee of Earnest Rorer, brought suit in the circuit court of Mercer County against the People's Building, Loan & Savings Association, a corporation of Geneva, N. Y., on a certain stock certificate for eight and one-fourth shares, issued by such corporation on the 1st day of June, 1895. Summons was issued the 24th day of September, 1898, directed to the sheriff of Mercer County, for service in his bailiwick, but on the 28th day of September, 1898, it was served by one William Brown, by delivering a copy thereof to J. C. Noland, the duly-appointed attorney in fact of said corporation, to accept service in the county of Pleasants, his place of residence. On the 14th of November, 1898, judgment was rendered against the defendant by default for the sum of six hundred dollars. On the 15th day of November, 1898, the defendant appeared by attorney, and moved the vacation of such judgment for various reasons, the first being want of jurisdiction in the court to render the same. The defendant also filed its petitions and affidavits asking to be permitted to make defense. The court overruled the defendant's motion, and refused to allow it to make defense. From these rulings the defendant seeks relief in this Court. The principal question insisted upon is want of jurisdiction. The jurisdiction of the circuit court is specified and limited by chapter 123 of the Code; and, while its jurisdiction—being general in its nature—will be usually presumed, it must come within these limitations. The record affirmatively shows that the defendant is a corporation, nonresident of this State, and the only provision by which the plaintiff claims that the circuit court of Mercer County had jurisdiction is under the second clause of chapter 123, Code, as amended by chapter 46, Acts 1897, in words as follows, "Where it does business." He further claims that, because the record is silent, the court will presume the defendant was doing business in Mercer County. The record does not affirmatively show jurisdiction in the court. Admitting that the issuing of stock was business done in Mercer County, its date is the 1st of June, 1895, while the statute requires a present doing of business. On the contrary, it plainly appears from the record that the defendant is not doing business in Mercer County. If it had been, it

would have had an agent therein on whom process could have been served, and it would have been unnecessary to send the process to Pleasants County. The sole reason the statute confers jurisdiction in such cases is because of such agency, as the defendant can do business only by and through agents; and the absence of such agent is proof positive that no business was being done. In the case of *Humphreys* v. *Newport News & M. Val. Co.*, 33 W. Va. 135, (10 S. E. 39), it was held that a "foreign corporation, doing business in this State, having no principal office, or president, or other chief officer resident therein, may be sued in any county wherein it does business, where the cause of action arose out of this State, if process can be legally served in such county." That is to say, if the law does not provide other place of service or suit, it may be brought in the county where the corporation does business, and service may be had on any agent in charge of such business. The jurisdiction is conferred, not because the party does business alone, but because in doing business it furnishes a sufficient agency by which it may be reached by process, the same as if it were a natural person, and has some one in the county to protect its interest. Having jurisdiction for any cause except under section 2, chapter 123, Code, the circuit court may issue its process to any county. But it must first have jurisdiction of the cause of action before it can do this. Not having jurisdiction under any clause of the first section, it could not issue its process to any county except the county of Mercer, which it seems it did, but could not obtain service thereon, which is clear refutation of the alleged grounds of jurisdiction. Any other holding would permit suits against a corporation having a statutory attorney to be brought in any and every county of the State for no other reason than there was such an attorney in the state. This certainly was not the intention of the lawmakers. The court being without jurisdiction, its judgment is void, and it may be vacated on motion. Freem. Judgm. § 98. It is hardly worth while to answer the assertion that defendant's attorney appearing to move to set aside the judgment cured the jurisdictional defect, for this would hardly be doing business within the meaning of the statute, and, if it were, the summons should have been served at that time in that county, and such doing of

business could not be held to relate back to the institution of the suit. For these reasons, the judgment must be reversed and annulled, and the case remanded.

Reversed.

CHARLESTON.

THORN *et al. v.* THORN.

Submitted June 14, 1899—Decided November 11, 1899.

1. APPEAL—*Justice of the Peace.*
   An appeal by a party to a cause in a justice's court operates as a general appearance in the appellate Court, and gives that Court jurisdiction of the person of the appellant, and as a general rule the irregularities in the proceedings before the justice are waived by an appeal. (p. 6.)
2. SUMMONS—*Unlawful Detainer.*
   A case in which the language of the summons is sufficient to charge the defendant with unlawfully withholding the property therein described, and in which the property is deseribed with convenient certainty. (p. 6.)

Error to circuit court, Taylor County.

Action by Alva B. Thorn and Miranda Thorn against Abraham Thorn. Judgment for defendant, and plaintiffs bring error.

Reversed.

W.R. D. DENT, for plaintiffs in error.

CHARLES P. GAURD, for defendant in error.

ENGLISH, JUDGE:

This was an action of unlawful entry and detainer brought by Alva B. Thorn and Miranda Thorn against

Abraham Thorn before a justice of the peace of Taylor County. The summons issued by the justice read thus: "State of West Virginia, Taylor County, to wit. To any Constable of Said County: You are hereby commanded, in the name of the state of West Virginia, to summon Abraham Thorn to appear before me, Lewis Haymond, at my office, in the district of Grafton. in said county, on the 28th day of February, 1898, at 10:30 o'clock a. m., to answer the complaint of Alva B. Thorn and Miranda Thorn in a civil action for the possession of a certain house, garden, outbuildings, and farm land situated in Knottsville district, Taylor county, West Virginia, more particularly described in the complaint to be filed in this suit, in which the plaintiffs will claim judgment for possession of said real estate, and $50 damages for its detention. Given under my hand this 20th day of Ferbuary, 1898. Lewis Haymond, Justice of the Peace." The complaint filed in the suit by the plaintiffs specifically describe the property partly by metes and bounds, and claimed that the defendant unlawfully withheld the same from the plaintiffs, who demanded possession thereof, and fifty dollars damages for its detention. On the 28th of February, 1898, the defendant failing to appear in the case, the justice waited one hour, heard the evidence offered by the plaintiffs, and gave judgment for the possession of the premises described in the summons and complaint. On the 8th of March the parties appeared by their attorney, and the defendant, in pursuance of his notice to the plaintiffs, moved the justice to set aside the judgment rendered in said action, and grant him a new trial, for the reason that the constables' return on the summons was insufficient, and was amended according to the facts of its execution after the justice rendered his judgment, which motion was overruled; and thereupon the defendant obtained an appeal to the circuit court, and, the cause having been docketed in that court, on April 15, 1898, the defendant moved the court to quash the summons for errors appearing on the face thereof, which motion was sustained, the summons quashed, and the action dismissed, with costs. From this judgment the plaintiffs obtained a writ of error to this Court, assigning as errorthe action of the court in quashing said summons and dismissing the plaintiffs' action.

The defendant appeared before the justice, and moved to set aside the judgment and grant him a new trial because the constable's return on the summons was insufficient, and was amended according to the facts of its execution after the judgment was rendered. No motion was made to quash the summons itself. The question now presented is whether the motion to quash the summons in the circuit court did not come too late. This question was before this court in *Blankenship* v. *Railroad Co.* 43 W. Va. 135, (27 S. E. 355); and it was there held that "in an action before a justice of the peace, the defendant, not having entered a special appearance before the justice for the purpose only (and so stating in submitting his motion) of quashing the writ or return, cannot on appeal to the circuit court take advantage of any defect in the writ or return either by motion to quash or plea in abatement." But, even if this motion could be made in the circuit court, the summons seems sufficient. The defendant is summoned to answer the complaint of plaintiffs in a civil action for the possession of a certain house, garden, outbuildings, and farm land, situated in Knottsville district, Taylor County, W. Va., more particularly described in the complaint which he is summoned to answer. This Court held in *Simpkins* v. *White*, 43 W. Va. 125 (27 S. E. 361), (Syl. point 3), "If that description can be rendered certain by extrinsic evidence, it is sufficient;" and in the case at bar the description in the summons was aided by the complaint so as to make it specific, and described the property with convenient certainty. In section 26, chapter 50, of the Code, it is provided that "no summons shall be quashed or set aside for any defect therein if it be sufficient on its face to show what is intended thereby"; and there can be no doubt that the defendant knew what was intended by this summons, and, if he had any doubt the complaint, which was referred to in the summons, would have informed him. Again, in the case of *Layne* v. *Railroad Co.*, 35 W. Va. 438, (14 S. E. 123), (Syl., point 2), it was held that: "In order to take advantage of such a defect in the summons or return, the defendant must appear for that purpose only, and must so state in submitting the motion. If he appears generally, whether to move a continuance, or for any other purpose, he will be regarded as having waived all defects in the writ or re-

turn." Again, we find the law thus stated in 12 Am. & Eng. Enc. Law, 487: "An appeal by a party to a case in the justice court operates as a general appearance in the appellate court, and gives that court jurisdiction of the person of the appellant. As a general rule, the irregularities in the proceedings before the justice are waived by an appeal." Looking at the record in the light of these rulings, my conclusion is that the circuit court erred in sustaining the motion to quash said summons, and dismissing the plaintiffs' action. The judgment is reversed, and the cause remanded.

Reversed.

CHARLESTON.

MILLER v. HOLT.

Submitted June 17, 1899—Decided November 18, 1899.

1. EJECTMENT—*Description—Verdict.*
   Where the plaintiff in ejectment, in describing the land claimed by him in his declaration, sets forth the metes and bounds, and one of the calls is "thence N., 2 W., 490 poles, to a stake in a line of B. W.'s 750 acres," and said line, when ascertained, constitutes the division line between plaintiff's and defendant's land, the true location of which is the real controversy in the suit, the, jury, by its verdict, must find the true location and a verdict and judgment thereon, which merely finds for the plaintiff the land as described in the declaration, does not determine the question raised by the pleadings. (p. 11.)

2. BOUNDARIES.
   Before the plaintiff can recover, he must identify the land claimed, so far as the exterior boundaries are concerned. (p. 12.)

3. DESCRIPTION.
   The call for the line of another tract of land, which is proved, is more certain than, and shall be followed in preference of, one for mere course and distance. (p. 13.)

Error to circuit court Ritchie County.

Action by D. H. Miller against W. B. Holt. Judgment for plaintiff, and defendant brings error.

Reversed.

B. F. AYERS and BROWN, JACKSON & KNGHT, for plaintiff in error.

W. N. MILLER, for defendant in error.

ENGLISH, JUDGE:

This is an action of ejectment brought by D. H. Miller against W. B. Holt, in Ritchie County, for the recovery of three tracts of land, described in the declaration as tract No. 1, containing four hundred and thirty acres; No. 2, five hundred acres; No. 3, five hundred acres; in all, one thousand four hundred and thirty acres,—being part of a two thousand acre tract patented to James Newport and others, trustees of Isaac Sidman, by patent dated April 18, 1786, then in Harrison County, beginning at a beech and pointers in an original corner of said two thousand acres and No. 6; running thence N. 88 E., 400 poles, crossing the waters of Little Leading creek, to an ironwood and pointers in another original corner of said two thousand acre tract; thence N., 2 W., four hundred and ninety poles, to a stake in a line of Benjamin Webb's seven hundred and fifty acres; then with his line and a line of Dennis Dye's one hundred and fifty acres, N., 71 W. three hundred and eighty poles, to a white oak, said Dye's corner; thence, with two of his lines, N. one hundred and fifty-five poles, to a white oak; thence S., 888 W., forty-five poles, to a stake in another line of said two thousand acres; and thence, with said line, S., 2 E., seven hundred and sixty poles, to the beginning,—excepting from the above boundary four hundred acres conveyed to R. E. Taylor and B. F. Prince by the clerk of the county court by deed bearing date August 25, 1881, recorded in Deed Book No. 22, pp. 131-133, of the land records of Ritchie county, containing one thousand and thirty acres. The defendant demurred to the declaration at rules, but did not insist upon it in argument. The plea of not guilty was interposed, and issue joined thereon. The case was submitted to a jury. The defendant demurred to the plaintiff's evidence. The jury found a con-

ditional verdict for the plaintiff, if the law be for the plaintiff; that he recover from the defendant the possession of the land in his declaration specified, and that he is entitled to the same in fee simple; and also found the excepted boundary of the four hundred acre tract conveyed to Taylor and Prince by the clerk of the county court, as aforesaid, giving the bounds and description thereof by reference to the plat returned under the order of survey, but, if the law be for the defendant, then they found for him. There was a joinder in the demurrer, and subsequently the court found the law to be with the plaintiff upon the demurrer to the evidence, and entered judgment for the plaintiff on the conditional verdict, and from this jugdment the defendant obtained this writ of error.

The first assignment of error relied on by the defendant relates to the action of the court in permitting the deed from Peter Van Winkle to William Henry Titus, of July 6, 1846 to be read in evidence over the objection of the defendant. This deed purports in the body of it to have been executed by Van Winkle, commissioner of delinquent and forfeited lands, and the signature should correspond with the rest of the deed, but is simply signed, "P. G. Van Winkle," without any addition or description. Now, it appears that the record of the chancery proceedings authorizing Van Winkle, as commissioner, to advertise and sell Isaac Sidman's survey No. 7, containing one thousand four hundred and thirty acres, describing it as part of two thousand acres patented to James Newport and others, attorneys in fact and trustees of Sidman, giving the metes and bounds of said one thousand four hundred and thirty acres, was offered in connection with said deed of Van Winkle; that on the face of the deed he recites his proceedings in reference to the sale of said land under the decree to William Henry Titus, and concludes the deed as follows: "In testimony whereof I, the undersigned commissioner, have hereunto set my hand and seal this sixth day of July, in the year 1846. [Signed] P. G. Van Winkle. [Seal.];" and two justices certify that he acknoweldged it as commissioner of delinquent and forfeited lands for Ritchie County. In the circumstances, we can but regard this deed as executed as commissioner, and not his individual deed.

The plaintiff next offered in evidence a deed from said Titus to John D. Clute, dated October 22, 1846; a deed from said Clute to Jacob F. Merrett, dated February 18, 1865; and a deed from said Merrett to the New York & Hughes River Oil Company.

As to the deed from Clute to Merrett, it is claimed there should have been a seal attached, as required by sections 14 and 15 of chapter 51 of the Code of 1868. In the certificate of acknowledgment to this deed, John Adriance, who took the acknowledgment, recites that he is a commissioner appointed by the governor of West Virginia for the state of New York, and concludes the certificate, "Given under my hand and seal of office," and signs it, "John Adriance, West Virginia, Commissioner," and the word "Seal" is written to the left; and in the certificate from Merrett to the New York & Hughes River Oil Company John Adriance took the acknowledgment, reciting the same, but certifies it under his hand and seal as notary public. The circuit court committed no error in overruling the objections to the admission of these deeds, as in the first we would presume the proper seal was affixed, and in the latter the certificate is good whether in taking it the officer acted as commissioner or notary public, and the same presumption would arise as to the seal as in the first-mentioned deed. In the case of *Sumner* v. *Mitchell*, (Fla.; Jan. 20, 1892) reported in 14 L. R. A. 815, Syl., point 7 (s. c. 10 South. 562), it is held that, "where the title of an officer taking an acknowledgment of a deed is written out in full in the body of the certificate, its omission from the signature is immaterial, and affixing it to the signature is itself sufficient. Initials may, however, be used, and are sufficient to designate such title." See also, Devl. Deeds, § 501.

It is claimed, also, that the court erred in permitting the deed from the New York & Hughes River Oil Company to W. A. McCosh to be read in evidence to the jury, because there is no allegation in the deed of the fact that said company is a corporation existing under the laws of West Virginia or of the United States. This I regard as unnecessary. It appears on the face of the deed that it is a corporation, and that the annual meeting of the stockholders it passed a resolution authorizing its property, real and

personal, to be conveyed under the common seal thereof, by deed duly executed and acknowledged by the president and secretary of the board of trustees, and it seems to have been signed and acknowledged as the law then required.

It is also objected that the deed from McCosh to Miller was improperly admitted—First, because the grantor had no title to convey; second, because of erasures and interlineations on the face of the deed; and, third, it did not relate to the land in controversy. As to the first objection, it is not tenable, if we are correct in what we have said as to the former conveyances; as to erasures and interlineations, if the deed is legible, we cannot see that its validity is thereby affected; and, as to its not relating to the land in controversy, the description is the same as in the former deeds.

The plaintiff also offered in evidence a certified copy of a deed from C. T. Caldwell, special commissioner, to W. D. Miller, for this land, and in connection therewith the record and proceedings in the chancery cause of Allen Hay against the New York & Hughes River Oil Company and others, in which a decree was rendered authorizing said Caldwell to execute a deed for said land on behalf of said company to said Miller, and in connection therewith the copy of the deed was improperly admitted in evidence.

The plaintiff in error claims that the court erred in overruling the motion to set aside the verdict, and grant him a new trial, on the ground that the same is contrary to the law and the evidence, because the jury had no right to insert in their verdict the description of the Prince and Taylor four hundred acres. They should have found simply a general verdict, and referred it to the court to fix on the surveyor's plat filed in the cause the excepted boundary.

The plaintiff further claims that the verdict should be set aside because the plaintiff did not identify the land claimed in his declaration. Looking at the map returned by the surveyor in this case, and reading the evidence relative thereto indicate that one of the main controversies was as to the proper location of the Webb line; one of the calls in the description of plaintiff's land, as set forth in his declaration, being, thence N., 2 W. four hundred and ninety poles, to a stake in a line of Benjamin Webb's seven hundred and fifty acres." The beginning corner of the

plaintiffs' land appears to have been identified as at B on the surveyors' map, and a well-marked line is found running with the first call, counting forty-nine years running E., three hundred and sixty-eight poles, to the point marked "M" on the map. The defendant claims that to be the S. E. corner of the survey, while the plaintiff claims the corner to be thirty-two poles further east, at the point marked "A". No marking, however, is found east of the point M. The next call of plaintiff's description of said land is, "thence N., 2 W., four hundred and ninety poles, to a stake in a line of Benj. Webb's seven hundred and fifty acres." Running this call from M, N. four hundred and ninety poles, the surveyor found a well-marked line, counting forty-nine years, while, running the same course from the point A, no marks indicating a line were found. Here then was a disagreement as to the location of this Webb line. No evidence, documentary or otherwise, was offered to show that said Webb was the owner of any seven hundred and fifty acre tract in the neighborhood. The defendant claimed this line at one place, and the plaintiff at another, and it is very material to the proper solution of this case that this line should be definitely fixed; but, instead of doing so, the court gave judgment upon the verdict of the jury, the land being described as in the verdict, and following the description given by the plaintiff in his declaration, and settled nothing as to the proper location and boundary of the land, which was necessary to entitle the plaintiff to recover, and was the main question over which the contest was made. In the case of *Coal Co. v. Howell*, 36 W. Va. 490, (15 S. E. 214), this Court held that, "before the plaintiff can recover, he must identify the land claimed, so far as the exterior boundaries are concerned." The necessity of fixing the proper location of the Webb line is apparent, when attention is called to the fact that, after reaching that line, the next call is, "then, with his line and a line of Dennis Dye's 150 acres, N., 71 W., 380 poles, to a white oak, said Dye's corner." The plaintiff, Miller, by his declaration, claims that the defendant, Holt, unlawfully withholds from him the possession of the land therein described. To show this, it is incumbent on him to locate his boundaries, and show that the defendant is claiming to hold possession with them. Hutchinson, in his valuable work on

Land Titles (page 287), says: "A line of an old survey or, adjoining tract, called for in the deed, controls, unless in conflict with some natural object,"—citing *Pennington* v. *Bordley*, 4 Ha. & J. 450; *Howell* v. *Merrill*, 30 Mich. 283. See also *Campbell* v. *Branch*, 49 N. C. 313, in which the court in its opinion says: "It is equally well settled that the call for the line of another tract of land, which is proved is more certain than, and shall be followed in preference to, one for mere course and distance,"—citing *Carson* v. *Burnett*, 18 N. C. 546. In *Pennington* v. *Bordley*, *supra*, this Court held that a tree called for is not more certain than a line of a tract of land. "They are to be rendered certain by proof, and can be identified in no other way. A tree, being a natural and visible object, is not more capable of proof than a line." The location of this Webb line was necessary, in order to determine whether the defendant was guilty of unlawfully withholding the premises in the declaration mentioned. It may be, and perhaps was, a question of fact for the jury; but the jury, by its verdict, failed to respond to the question, and the court, by following the verdict, did not determine the controversy raised by the pleadings. The judgment must be reversed, the verdict set aside, and a new trial awarded.

Reversed.

CHARLESTON.

FREDERICK v. COX.

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50 336
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59 243

Submitted June 19, 1899—Decided November 18, 1899.

1. JUDICIAL SALE—*Title.*

The title of a purchaser of property under a decree or order will not fall with its reversal or setting aside; he not being a a party, and all persons holding an interest in the land sold being parties. (p. 15.)

Appeal from circuit court, Ritchie County.

Bill of review by S. B. Frederick against F. M. & J. E. Ferrell and others. Decree for plaintiff and defendant Cox appeals.

Reversed.

ROBINSON & PIERPOINT and H. C. SHOWALTER, for appellant.

DAVIS & WOODS, for appellee.

BRANNON, JUDGE:

In a suit in equity in the circuit court of Ritchie County of Ferrell & Ferrell against Frederick, to sell Frederick's land for payment of judgments, there was a decree for its sale, under which it was sold to Ash and Patton, the sale confirmed, and the land was conveyed under the decree of confirmation by a commissioner to the purchasers, and they conveyed it to Cox. Later a bill of review was filed by Frederick to reverse these decrees, and they were reversed, the deed to the purchasers cancelled, the deed from the purchasers to Cox cancelled, and the land restored to Frederick. Cox, who alone defended, alone appeals.

The demurrer to the bill of review ought to have been sustained. It showed no right to relief as to Cox, the demurrant. It showed that a sale had been made under a decree and confirmed, and a deed made to the purchasers,

Ash and Patton, and that they had sold and conveyed the land to Cox; and I cannot see how a decree could be made, not only reversing the former decrees, but canceling both the deed from the commissioner under the decree to the purchasers, Ash and Patton, and the deed from Ash and Patton to Cox, and restoring the land to Frederick by writ of possession, thus taking away from the purchasers and their vendee all title, in the face of Code 1891, chapter 132, section 8, saying: "If a sale of property be made under a decree or order of a court, and such sale be confirmed, though such decree or order be afterwards reversed or set aside, the title of the purchasers at such sale shall not be affected thereby; but there may be restitution of the proceeds of sale to those entitled." The purchasers were strangers to the cause. Most of the courts have held that an innocent purchaser's title does not fall with the reversal of the decree of sale, but the Virginia courts held otherwise; and this section was put in its Code of 1849 and in ours for the very purpose of avoiding that rule, and of giving some virtue and force to a title acquired at a judicial sale under a solemn decree of a court administering the law of the land, so that such sale would not be a mere bauble. Every one having any title or interest in the land sold at the date of its sale was before the court, and the purchasers were innocent strangers to it. There is not a particle of evidence to sustain the bill of review for newly-discovered evidence bearing on the decree, even if there is any error in law, which I do not discern, and it is immaterial; but in either case the purchasers' title cannot be affected. We cannot look into the depositions to find error of law, but, if we could, I do not see any error. Even if we treat the bill as original to affect the decree of confirmation, the evidence is utterly inadequate. It shows actual knowledge of the suit by Frederick, his negligence and want of defense, and that he had no defense, and knew of the decree of sale and of the notice of sale; and, besides, that he became tenant of the purchasers, told Cox to buy of them, and agreed to give him possession and estopped himself from claiming the land. He is only one of thousands,—an unfortunate debtor unable to pay. But the bill is one of review, and the title of the purchasers cannot be affected by a reversal of the decree of sale, however erroneous

The reversal of the two decrees, and the destruction of the title of Ash and Patton and Cox under them is erroneous. Besides, there could not be a decree adverse to that title without the purchasers as parties. Cox had right to have them before the court. The decree is reversed, and bill of review dismissed.

Reversed.

CHARLESTON.

WHITE *et al.* v. CHRISTY.

Submitted June 14, 1899—Decided November 18, 1899.

1. JUSTICE OF THE PEACE—*Procedure.*

While it is the duty of a justice, under section 66, chapter 50, of the Code, to dismiss the plaintiff's action "if he fail to appear and prosecute his action within one hour after the time for appearance mentioned in the summons or last order of continuance," yet the plaintiff has the right, under the sixth clause of the same section, to show cause why his action ought not to be dismissed, and has the right to contest the motion of the defendant to dismiss, after the hour is up, at any time before the order of dismission is made. (p. 20.)

Error to circuit court, Randolph County.

Proceeding on notice by George W. White against N. Christy. From the judgment, White brings error.

Reversed.

HARDING & HARDING, for plaintiff in error.

CUNNINGHAM & STALLINGS, for defendant in error.

MCWHORTER, JUDGE:

This was a proceeding on notice, brought by George W. White before Justice W. S. Kelley, in Randolph County, to

quash an execution issued by said justice in favor of N. Christy, trustee, against George W. White, Caleb White, and Job W. Parsons, founded on a judgment rendered therefor by James Coberly, late justice, for certain personal property, or its alternative value of two hundred dollars. The execution was issued February 26, 1898, and returnable within sixty days. The notice in writing is as follows:

"To N. Christy, Trustee: Take notice that on the 8th day of April, 1898, at 8 o'clock a. m. of said day at the office of W. S. Kelley, a justice of the peace in the town of Elkins, in Leadsville district, Randolph County, West Virginia, before said justice, I will make a motion to quash an execution and writ of possession issued by said justice on the 26th day of February, 1898, for $200 and costs, in the case of N. Christy, trustee, against Geo. W. White, Caleb White, and Job W. Parsons, and now in the hands of E. E. Taylor, a constable of said county, for execution, upon the following grounds, towit: That said execution and writ of possession were issued contrary to law; that the said justice had no authority to issue the same, and that said suit was taken to the circuit court on appeal from a judgment of James Coberly, quashing a former execution and writ of possession issued in said suit, and by the circuit court affirmed; that the judgment upon which said execution and writ were based was a nullity, because the said Geo. W. White complied with the judgment or order in said suit before it was appealed as aforesaid, and before any writ was issued upon said judgment; because they (the said defendants) have fully complied with every order of the court in said cause; and for other reasons. Geo. W. White, by Counsel."

"Return: Served the within notice on the within named N. Christy, trustee, by delivering to him in person, in Tucker county, West Va., a true copy thereof this, the 29th day of March, 1898. Chas. Campbell, C. T. C."

"State of West Virginia, Tucker Co., to wit: Personally appeared before me, B., Parsons, a notary public in and for said county of Tucker, Charles Campbell, who, being by me first duly sworn, deposes and says that he served the within notice on the within named N. Christy, trustee, as shown by the above return made by him. Chas. Campbell, C. T. C.

"Sworn and subscribed to before me this — — day of April, 1898. B. Parsons, Notary Public."

On the 8th day of April the parties appeared, both in person and by attorneys, and it appears from the record that plaintiff N. Christy moved to quash the notice upon the "grounds that the beneficiary under the trust was not a party in the notice, and that said N. Christy had appeared for the purpose only; but before the justice passed upon said motion, and after it was argued, the attorney for N. Christy, then made a second motion that the service was defective. The motion was argued by counsel, and the justice sustained the motion that the constable had not sworn to the service on said notice. Therefore George W. White asked the continuance of the cause until he could get an amended return by the constable on the said notice." —and by agreement the case was continued to May2, 1898, on which day the record shows the following proceedings were had: "May 2d, 1898. This day came the plaintiff, G. W. White, by counsel, and N. Christy, trustee, in person and by counsel, at 9 o'clock a. m., announced himself ready for trial, and the counsel for the plaintiff, G. W. White, having been present for about one-half hour previous to and up to the time the said motion was made, and, immediately upon said motion being made, counsel for White arose to address the justice, when defendant N. Christy's attorney still pressed for the case to be dismissed upon the grounds that he had waited one hour, and plaintiff White's counsel, and not himself, was ready for trial; whereupon the justice overruled said motion for the reason that the plaintiff had been present by atty. for some time previous, and announced himself ready for trial as soon as Christy's atty. stopped talking in making a motion to quash the notice, because the notary who took the affidavit of constable didn't use his official seal, and because he didn't give the precise date of month in affidavit. Upon consideration the justice overruled said motion, whereupon counsel for White introduced his witnesses, and, after hearing the testimony, and considered, the justice quashed the execution issued on the 26th day of February, 1898, and E. E. Taylor, C. R. C., who levied said execution, is ordered to release the property levied on in said execution." From which judgment the plaintiff Christy appealed to the cir

cuit court of said county, and on the 9th day of May, 1898, the following proceedings were had in said case in the circuit court; "This cause came on this day to be heard upon motion of said Christy, trustee, to reverse and dismiss the judgment of Justice Kelley, rendered herein on the 2d day of May, 1898, on account of defective notice and return thereon, and for the reason that said justice tried this cause and rendered a judgment therein quashing execution issued on the 26th day of February, 1898, after 9 o'clock a. m. (the hour at which said trial was set was 8 o'clock a. m.), and insisting that said justice had no jurisdiction after that hour to try said motion or cause; and that the said Christy, trustee, demanded a dismissal of this cause, and of the motion contained in said notice at nine o'clock a. m., which the justice refused, and after that time, and without the consent of the said Christy, trustee, and in his absence, rendered said judgment quashing said execution, to which motions counsel for Geo. W. White appeared; and, after hearing the argument of counsel on said motion on both sides, and maturely considering thereof, the court is of opinion that the motion of the said Christy to reverse the said judgment of the justice should be sustained. It is therefore ordered that said judgment of W. S. Kelley, rendered on the 2d day of May, 1898, at his office in the town of Elkins, be, and the same is hereby, reversed, and set aside, as being rendered without jurisdiction, and that the said N. Christy, trustee, recover from the defendant his costs in and about his defense herein expended." And from which judgment plaintiff in error procured from this Court a writ of error, alleging that it was error to hear and determine said motion in the absence of all proof, and in assuming certain facts existed manifestly contrary to exhibits filed, and especially to transcript from docket of judgment by said justice, and in sustaining said motion to reverse said judgment for want of jurisdiction by said justice to enter the same. The only objection raised to the notice was that the beneficiary under a trust deed was not made a party to it. The judgment was in favor of the trustee, who held the legal title to the property sued for in the action at law, and the *cestui que* trust could not be made a party in such proceeding. The notice sufficiently describes the execution to be quashed, and the party had

full ten days' notice prior to the day set for hearing before the justice, and there is no defect in the service. "The only question to be considered," as stated by defendant in error in his brief, "is whether there was any such error committed by the justice as justified the circuit court in reversing his judgment;" and he cites *Freestone Co.* v. *Parrish*, 34 W. Va. 652, (12 S. E. 817), to sustain the court in its action in reversing the justice's judgment. The case cited was very different from the case at bar. In that case the plaintiff failed to appear, and prosecute his suit, and the justice, instead of entering a judgment for *non prosequitur*, as it was his duty to do, on motion of the defendants impanelled a jury, which rendered a verdict, on which the justice rendered a judgment for the defendants. It is contended by appellee that under section 66, chapter 50 Code, if plaintiff failed to appear, and prosecute his action, within one hour after the time for appearance mentioned in the summons or last order of continuance, the justice has no jurisdiction thereafter in the case to do anything but dismiss it, if such dismission is asked for by the defendant. This is true where the plaintiff is in default, and is not present looking after his interests in the case, either by himself or his agent or attorney; but this statute will hardly be held to apply in a case where it appears from the record that the attorney for plaintiff is present, announcing himself ready for trial, when, for some time before the end of the hour, defendant's attorney was discussing a motion to quash the proceedings, and, when the hour was up, moved to dismiss the case under said section, and the justice overruled the motion, "for the reason that the plaintiff had been present by attorney for some time previous, and announced himself ready for trial as soon as Christy's attorney stopped talking in making a motion to quash the notice because the notary who took the affidavit of constable didn't use his official seal, and because he didn't give the precise date of month in affidavit." These facts appear in the proceedings before the justice in this case, and are a part of the record. While it is the duty of the justice to dismiss the action at the end of the hour, if moved to do so by the defendant, in case the plaintiff fails to appear and prosecute his action, yet the plaintiff has the right, under the sixth clause of the same section, to show cause why

his action ought not to be dismissed, and has the right to contest the motion of defendant, even after the hour is up, at any time before the order of dismissal is made. It appears that on the overruling of the motion to dismiss the case by the justice he proceeded to hear the testimony, and on consideration thereof quashed the execution. The evidence adduced before the justice does not appear in the record. The notice sets up the following grounds in support of the motion to quash the execution: "That said execution and writ of possession were issued contrary to law; that said justice had no authority to issue the same, that said suit was taken to the circuit court on appeal from a judgment of James Coberly, quashing a former execution and writ of possession issued in said suit by the circuit court affirmed; that the judgment upon which said execution and writ were based was a nullity; because the said Geo. W. White complied with the judgment or order in said suit before it was appealed as aforesaid, and before any writ was issued upon said judgment; because they (the said defendants) have fully complied with every order of the court in said cause, and for other reasons;" and the only defense offered to said notice was the motion to quash the notice, and the motion to dismiss the same, because the hour was up beyond which the defendant in the notice was not bound, under the statute, to wait on the plaintiff, as set forth in the record of the justice's proceedings under date of May 2, 1898. And this was the only defense offered in the circuit court, and the court reversed and set aside the judgment of the justice as being rendered without jurisdiction. The judgment of the circuit court is reversed; and the case remanded, to be heard upon the allegations contained in the notice, and such defense thereto as may be proper to be made.

BRANNON, JUDGE:

I question whether the judgment is appealable, because it only reverses the judgment of the justice, and does not dismiss action. The appeal, by its own force, reversed the justice's judgment. The circuit court judgment did only this, and left the action for trial there. There was no motion to dismiss the action. But I consent to treat the judgment as it was likely intended, as costs are given—one dismissing the action. The appellee makes no point as to this.

Reversed.

CHARLESTON.

HOGG *v.* BROWNING *et al.*

Submitted June 8, 1899—Decided November 18, 1899.

1. LEGACY—*Will—Charge on Land.*
   Though legacies do not stand upon as high ground as debts, yet, if the personal fund be inadequate, or if there are expressions in a will tending to show that the testator had the land in his mind for their payment, they are a charge on the land devised. (p. 23.)

2. LEGACY—*Charge on Land.*
   Whether legacies are a charge on land devised is a question of intent of the testator. (p. 23.)

3. CHARGE ON REALTY—*Legacy—Will.*
   Realty is not chargeable with legacies unless the intent to charge it is expressed in the will, or appears by implication from it. (p. 26.)

Appeal from circuit court, Brooke County.

Action by Abba E. Hogg against Henry Browning and others. From the decree, complainant appeals.

Affirmed.

W. W. ARNETT and PALMER & PALMER, for appellant.

R. H. COTTON, for appellees.

BRANNON, JUDGE:

Abba E. Hogg, widow and sole legatee and devisee of William Hogg, deceased, and executrix of his will, brought a chancery suit in the circuit court of Brooke County, in her own right and as executrix, against Hannah Browning and others, stating in her bill that her husband died considerably indebted, owning certain lands, and that it would be necessary to sell some of the lands to pay his debts, and that she was sole devisee under his will of those lands, and stating that among the debts was one arising out of a legacy given by George Hogg's will to Hannah Browning and her children, of two thousand eight hundred dollars, which,

with other legacies, George Hogg's will directed to be paid by his three sons, William, George W., and John F. Hogg; and the bill stated that it was suggested that this legacy, in addition to being a personal debt upon William Hogg, was by reason of the will of his father a charge on the land devised to him; and the bill asked that the will be construed, and that the court determine whether the Browning legacy was a charge, and that the debts of her husband be ascertained, and the land be sold, giving her her rights as widow. The court decreed that Hannah Browning's legacy was a charge, under her father's will, on the land by it given to William Hogg, for his portion of it, having preference over other debts, and the dower of Abba E. Hogg as widow of William Hogg, and giving her a gross sum for dower after payment of liens. She appealed from this decree.

The only question of any import in the case is whether the Browning legacy is a charge on the land. The will of George Hogg, Sr, does not in words charge it, but I think it clearly does so by implication. The law as to charge of legacies on land as expounded by the Virginia and West Virginia cases is very well settled. "Real estate is not chargeable with pecuniary legacies unless the intention so to charge is expressed in the will or such intention appears by implication." *McGlaughlin* v. *McGlaughlin's Legatees*, 43 W. Va. 226 (27 S. E. 378); *Thomas v. Rector*, 23 W. Va. 26. "Whether legacies are a charge upon real estate is a question of intention on the part of the testator." *Read* v. *Cather*, 18 W. Va. 263. *Downman* v. *Rust*, 6 Rand. (Va.) 587 lays down that if "the personal fund be inadequate or there be expressions in a will tending to show that the testator had the land in his mind the court will make them (legacies) a charge on the land rather than they shall go unpaid." 2 Lomax Ex'rs 171 says: "Roper after reviewing the cases in which legacies were charged by implication has observed that they afforded solid ground for inferring the intention of the testator to charge the real fund or its produce with legacies in aid of the personal estate. The real property was devised and there were expressions connected with that devise which afforded a reasonably plain inference that the land or its produce should be taken subject to legacies. But where the intention to subject

the real estate to legacies is merely probable or conjectural, and there are no expressions to charge, except such as are capable of being otherwise satisfied, a court of equity will not on conjecture or private persuasion, affect the real estate with payment of legacies. Where, indeed, an unprovided child or creditors are the persons endeavoring to establish the charge, the court will incline in their favor, if the inference of intent to charge be dubious; but, where the question is between mere voluntary legatees and the heir or the devisee, the court will require satisfactory conviction of the intent to charge the realty with legacies." 13 Am. & Eng. Enc. Law, p. 111, is the same. These extracts express the law upon the important and frequently arising question of charges by implication of legacies upon lands. With the light shed by them, let us look at George Hoggs' will: "(1) I appoint Robert M. Wells my executor. (2) I direct that my three sons, hereinafter named, pay all my just debts and funeral expenses. (3) I give to my wife, Sallie Hogg, all my personal property in and about my house, together with my horse, buggy, and harness, also the use of the house in which I now reside and live, during her natural lifetime, for the use and comfort of her and my daughter Elizabeth. (4) I direct that my three sons, George W., William, and John F. Hogg, pay to my wife, Sally, five hundred dollars per year during her natural lifetime. (5) I give my son George W. Hogg two parcels or tracts of land, known as the 'Mill Property' and 'Trimble Farm.' (6) I give to my son William the homestead farm on which I now reside. (7) I give to my son John F. Hogg my farm known as the 'Brady Farm.' (8) I further direct that my three sons, namely, George W., William, and John F. Hogg, in consideration thereof, pay the following legacies and bequests, namely: To my daughter Lucy Cheffly, one thousand dollars; to my daughter Hannah Browning, twenty-eight hundred dollars; to my daughter Elizabeth Hogg, four thousand dollars; to my daughter Sarah A. McCord, three thousand dollars; to my granddaughters Sally, Ame, and Myra Wells, children of my daughter Harriet, now dec'd, fifteen hundred dollars. * * * (14) I direct that the county court appoint three disinterested freeholders to appraise the three proportions of land I have given to my sons, in order that they

may each pay their due proportion of the debts, dues, demands, legacies, and bequests herein and above mentioned." I first call attention to a distinction important to be regarded. Where the testator gives pecuniary legacies, and devises land to others, the law presumes, unless the intention is clear otherwise, that he intends the legacies to be paid out of his personalty. The personalty is the primary fund for debts and legacies. But where he gives land to a devisee, and requires him to pay a legacy, there can be no presumption that the testator intended the devisee to pay legacies out of the personalty, rather than realty,—to make it a mere personal obligation on the devisee, rather than a charge on the land he derived from the testator. Indeed, it should be a presumption the other way; that is, he meant the land to be good for the legacy, because he obliged the devisee to pay the legatee. *Carter* v. *Worrel* (N. C.) 2 S. E. 528. This will directs the three sons to pay all debts. It then gives them lands, and in immediate connection with the devising clauses, and in language referring to them, says, "In consideration thereof" the sons shall pay particular legacies. He made no provision for their payment out of personalty, if there was any besides that given his wife, and it seems he owned no land besides that given his sons; and as he surely expected all these legacies, amounting to twelve thousand three hundred dollars, besides the annual legacy of five hundred dollars to his wife, to be paid, we may ask, how could he expect them to be paid, except out of the land? The words "in consideration thereof" (that is, in consideration of the gifts of lands to his sons, they should pay), alone show plainly, under the case referred to in 6 Rand. (Va.), that the testator, having no personalty, but requiring his sons to pay in consideration of devises, "had the land in mind" for their payment,—in fact, looked only to the land. Next add the force of the clause requiring an appraisement of the value of the lands to show the proportion "of the debts, dues, demands, legacies, and bequests herein mentioned." It tells us that the testator meant each son to pay proportionately to the land he received, thus making it the measure, basis, and consideration of the obligation of his sons to pay. And under the text cited from Lomax these daughters are not mere strangers, but

daughters, having as strong claim on him for payment of what he gave them as had the sons to retain their lands; and shall they keep his lands, valued at thirty-nine thousand five hundred dollars, and the daughters go unprovided for and unpaid? Did George Hogg intend a result so unjust and disastrous to his daughters, which might entail upon them abject poverty and want? Law and common sense say that he did not. Therefore the circuit court properly held that Mrs. Browning's legacy was a charge on the land devised to William Hogg.

The claim in Mrs. Hogg's petition for appeal, that she was not given land in kind for dower, instead of money, is utterly untenable, when we see from her bill that she consented to a sale of her husband's land, and to receive "her dower interest in money out of the amount realized from the sale." Her point that her age was fixed at forty-two for assessing her dower interest in money becomes nil when we see that she was before the commissioners, gave a deposition (which she has not inserted in the record), and the parties agreed her age to be forty-two as the commissoners report, and she did not except. She was given her interest after payment of the legacy to Mrs Browning, and other liens having preference over her dower, and this was no error. Decree affirmed.

Affirmed.

CHARLESTON.

FELTON v. FELTON *et al.*.

Submitted June 15, 1899—Decided November 18, 1899.

1. RECEIVER—*Report.*
   A special receiver's report of his accounts has no binding force in the case unless confirmed by the court. (p. 28.)
2. RECEIVER—*Commissioner.*
   A special receiver may be required by the court, at the instance of any party interested, to make settlement before a commissioner; and a commissioner is not bound to take as correct the report of his accounts made by the receiver. (p. 28.)
3. RECEIVER—*Settlement.*
   A settlement of a receiver's accounts made by a commissioner is taken to be right as to matters of fact, unless intrinsic or other evidence manifests errors in it. (p. 28.)
4. COMMISSIONER—*Report.*
   If a commissioner fail to return, as he should do, with his report, the evidence before him, the party desiring it must ask the court to require its production; else, he cannot make its absence a ground of error. (p. 30.)

Appeal from circuit court, Randolph County.

Suit by John C. Felton against Joseph H. Felton and others. From the settlement of the accounts of Henry Skidmore, receiver, he appeals.

Affirmed.

SAMUEL V. WOODS and W. T. GEORGE, for appellant.

F. O. BLUE, for appellees.

BRANNON, JUDGE.

In the chancery suit, in the circuit court of Randolph County, of Felton v. Felton, Henry Skidmore was appointed special receiver of certain personal property involved in the suit, consisting of lumber, logs, wagons, horses, a sawmill, and other things pertaining to a lumber business, with power to sell lumber on hand, manufacture

into lumber logs already cut, and sell the lumber, and sell the mill and other property. The receiver was called to settle his accounts by reference to a commissioner, and, the commissioner finding in his hands a balance of five hundred and seventeen dollars and ninety-five cents, the court confirmed the report over exceptions made by Skidmore, and directed him to apply the same on specified costs and debts decreed against the fund; and Skidmore appeals because the court found in his hands a balance of five hundred and seventeen dollars and ninety-five cents, instead of one hundred and ninety-seven dollars and thirty-eight cents, as shown by his report as receiver. It seems to be claimed that the report of Skidmore as receiver must be taken as correct, even over the master's report. Skidmore made one report to the court, which was not confirmed; the court expressly reserving all questions touching its correctness for future action. The other report was laid before the commissioner. I do not understand that a mere report or account of a receiver has any binding force, unless confirmed, because it is his own *ex parte* statement, may be partial, and is to be examined by the court or master. There is a wide distinction between his report and a master's. Smith, Rec. § 355; High, Rec § 801. The receiver should, without order, render accounts and vouchers at reasonable intervals, with vouchers, for inspection by those interested, who, if not satisfied, can ask a settlement before a commissioner; and he is at all times subject to be called on by the court to pass his accounts before the master. Beach. Rec. §§ 746, 748, 801; Smith, Rec. § 416; High, Rec. §§ 797, 802. So there is no error in refusing to receive and decree upon the receiver's reports. But was it error to confirm the commissioner's report? need not say much as to the rule that commissioners' reports, in general, as to matters of fact, are taken as correct, unless shown to be erronous. *Fry* v. *Feamster*, 36 W. Va. 554, (15 S. E. 253). It is laid down, as to settlement of receiver's accounts, that the points of mistake must be definitely specified, and the errors must be clearly shown, if dependent on facts, and not intrinsic. Beach, Rec. § 801.

One exception to the report is that it finds too great an amount of receipts, and should have taken the receiver's reports as to this.

I have shown that the report has no probative effect. There is no other proof in the record to show the commissioner's debit of receipts excessive. If the evidence before him were in the record, and we could see his error in this matter of fact, we should correct it. Until chapter 8, Acts 1895, a commissioner need not return the evidence before him, unless exceptions were filed within ten days; but under that act he must return the evidence with his report. *Findley* v. *Smith*, 42 W. Va. 299, (26 S. E. 370). If he does not, the party should ask the court to make him do so. Skidmore did not do this. We therefore cannot say that there is or is not any error as to this exception. And, as to refusal to allow a disbursement of two hundred and forty-five dollars and fifteen cents, no evidence bears upon it; no evidence shows it to be a disbursement authorized by court, or actually necessary. The total of assets is one thousand four hundred and two dollars and twenty-four cents. Very many disbursements, amounting to eight hundred and eighty-four dollars and twenty-nine cents, were allowed. This one is a large one, materially diminishing the small fund; and High on Receivers (section 798) says that "a receiver will not ordinarily be permitted to make any expenditures which will seriously diminish the fund without the sanction and authority of the court, and it is his duty to apply to the court for instructions as to expenditures." This court held in *Crumlish's Adm'r* v. *Railroad Co.*, 40 W. Va. 627, (22 S. E. 90), that, in the absence of authority previously given, expenditures of a receiver, to be allowed, must be reasonable, proper, essential, and necessary in the due and ordinary execution of his office, and such as were contemplated in his appointment, and according to the nature of his business. In cases involving large outlay, he must "always apply to the court in advance for authority to make it." No evidence shows anything whatever under this rule for this large outlay, eating up the little remnant left after seemingly large legitimate expenditures, and no authority of court to make it; and, the commissioner and court refusing it, we are asked to reverse for its disallowance. From the little I can glean from the face of this voucher, it seems excessive for the work committed to the receiver, when we see so many other vouchers for such work. I see nothing to show that

it is within the work contemplated in the appointment. It is not shown to be necessary in the accomplishment of that work.

As to a refusal to allow an item of eighteen dollars alleged by the exception to have been allowed by a court order: There is no such order in the record. No evidence shows that the commissioner erred in allowing only one hundred dollars for compensation to the receiver in addition to attorney's fee of fifty dollars.

There was an exception because the commissioner did not file with his report the evidence before him. He does not expressly mention it in his report, as a part of it; but he surely filed it, and if he did, it would identify itself with the case, and need not be specially mentioned in the report. He must have filed it, because several depositions taken before the commissioner are in the record, and the clerk certifies that others were omitted from the record by direction of Skidmore's counsel. If there is anything in them to help his cause, I presume he would have inserted them. The commissioner does not appear to have failed to return the depositions. But, if he did, Skidmore could and should have asked the court to require him to file them. A party cannot let his case go to hearing, knowing of such failure of the commissioner, without asking the court to compel their production. He can get the benefit of them without resorting to an appeal. But they seem to have been returned, and the counsel of Skidmore asked the clerk to omit them.

Another assignment of error is that the court decreed the distribution of the fund found in the receiver's hands, and recommitted the case to a commissioner to take additional proof as to money which had or should have come into the hands of the receiver. The receiver was not discharged, and would have further money in his hands in the future. This recommitment could not go back of the close of the confirmed settlement. I understand it to be common practice to decree distribution from time to time of funds in the hands of receivers, plainly going to creditors, on which the receiver can have no possible personal claim, as this receiver had not. Creditors might complain of this. He cannot. Interlocutory or *pendente lite* orders for distribution are very common, and chiefly concern creditors

not the receiver, who has no claim on the fund. Smith, Rec. § 357. No creditor is complaining of this. The record indicates that the business is practically closed. Decree affirmed.

Affirmed.

CHARLESTON.

KOONTZ *v.* KOONTZ, *et al.*

47 31
49 81
49 82
47 31
59 419
47 31
163 561

Submitted June 8, 1899—Decided Nov. 18, 1899.

1. DEMURRER—*Pleading and Practice.*

   When a demurrer to a declaration is overruled, and the order overruling it shows the fact that nothing was alleged by the demurrant in favor of his demurrer, and final judgment is obtained by the plaintiff in the case, the judgment will not be reversed by reason of any defect in the declaration. (p. 33.)

2. RECORD—*Bill of Exceptions.*

   A paper purporting to be a bill of exceptions and copied into the record as such, will not be regarded or treated by the appellate Court as a part of the record, unless the record shows that it was by some order or memorandum entered on the order book of the trial court, made a part of the record. (p. 34.)

Error to circuit court, Marshall County.

Action by Elizabeth Koontz against E. W. Koontz and T. M. Powell. Judgment for plaintiff, and defendants bring error.

Affirmed.

ROBERT WHITE, for plaintiffs in error.

J. HOWARD HOLT, for defendant in error.

MCWHORTER, JUDGE:

Elizabeth Koontz, administratrix of William Koontz, deceased, brought her action of assumpsit in the circuit court

of Marshall County against E. W. Koontz and T. M. Powell, laying her damages at four thousand dollars. At the March term, 1897, defendants appeared, and demurred to the plaintiff's declaration, and the record shows that, no cause being assigned therefore, the demurrer was overruled by the court. The defendants then filed in writing the plea of payment, to which plea plaintiff replied generally, and a jury was duly impaneled to try the issue, and on the 26th day of March the jury returned a verdict for the plaintiff, and assessed her damages at two thousand seven hundred and eighty-seven dollars and seventy-nine cents. The defendants moved the court to set aside the verdict of the jury and grant them a new trial. On the 7th day of April, the defendants filed, in support of their said motion, the affidavits of J. K. P. Barker, E. W. Koontz, T. M. Powell, and H. W. Hunter, and on the 10th day of April, 1897, the court heard the arguments of counsel on said motion, and overruled the same, to which ruling of the court the defendants objected and excepted, and the court rendered judgment upon said verdict; and this is all that appears from the record. There is, however, copied with the record, and immediately following the said judgment entered on the verdict, a paper which purports to be a bill of exceptions on behalf of the defendants, signed by O. L. Holliday, special judge, but there is no memorandum or reference to the paper on the record recognizing it, or filing it, or making it a part of the record in the case. There is no entry on the record book in reference to any bill of exceptions, or to any bill of exceptions being prepared, or signed, or asked for; and, under the uniform rulings of this Court for many years, said paper cannot be considered in the hearing of the case in this Court. In *Phelps* v. *Smith*, 16 W. Va. 522 (Syl., point 1), it is held: "When the record does not show that a bill of exceptions had been taken, and made a part of the record by order of the court below, the appellate court will not consider it a part of the record, and will not look to it for any purpose upon writ of error." And in *Bank* v. *Showacre*, 26 W. Va. 48 (Syl., point 4): "A paper purporting to be a bill of exceptions, and copied into the record as such, will not be regarded or treated by the appellate court as a part of the record unless the record shows that it was, by some order or memorandum,

entered on the order book of the trial court, made a part of the record." In *Sweeney* v. *Baker*, 13 W. Va. 158, there was copied by the clerk into the record a certificate signed by the judge, stating that a demurrer to the declaration had been filed, and overruled by the court, but that the clerk had not entered the filing of the demurrer on the record, and it was held that the certificate of the judge was no part of the record. See, also, *Ramsburg* v. *Erb*, 16 W. Va. 787; *Hilleary* v. *Thompson*, 11 W. Va. 113; *Park* v. *Petroleum*, Co., 25 W. Va. 108; *Handy* v. *Scott*, 26 W. Va. 710; *Pegram* v. *Stortz*, 31 W. Va. 220, (6 S. E. 485;) *Winters* v. *Null*, 31 W. Va. 450, (7 S. E. 443). The defendants applied for and procured a writ of error, assigning numerous errors, all based upon the rulings complained of and the evidence in the case, which should have been brought here by bill of exceptions; but, that not having been done, this Court is unable to see whether error was committed to the prejudice of defendants or not on the errors assigned. There is nothing before this Court in support of the motion for a new trial except the four affidavits filed, and, in the absence of the proceedings and evidence in the case, it is impossible to see whether they are merely cumulative, or what weight should be given them on the hearing of the motion.

The demurrer to the declaration was overruled by the court, the court stating in the order overruling the demurrer the fact that nothing was alleged by the demurrants in support of their demurrer; and it does not appear from the record that the defendants objected or excepted to the rulings of the court in overruling the demurrer, but immediately filed their plea of payment, and entered upon the trial of the issue thus made; and in their petition for writ of error it is not assigned as error. Yet plaintiffs in error, in their brief, insist upon it as error for which the judgment should be reversed. Section 29, chapter 125, Code, in the first clause provides that: "On a demurrer (unless it be to a plea in abatement,) the court shall not regard any defect or imperfection in the declaration or pleadings, whether it has heretofore been deemed mispleading or insufficient pleading or not, unless there be omitted something so essential to the action or defense that judgment according to law, and the very right of the cause

cannot be given." This is intended to direct the court in deciding a demurrer when defects or imperfections in the pleadings are pointed out by the demurrant, and means that a demurrer shall not be sustained on merely technical grounds, or mere want of form; and the last clause of said section provides that: "If nothing be alleged by the demurrant in support of his demurrer, the court, if it overrules the same, shall state that fact in the order, and, if final judgment be obtained in the cause by the party whose pleading is demurred to, the same shall not be reversed by reason of any defect in the pleading so demurred to." The question of demurrer is not before this Court on objection or exception, and the plain and unmistakable language of the statute is that, in case the fact is stated in the order that nothing was alleged in support of the demurrer, and the same was overruled, and final judgment, obtained in the cause by the party whose pleading is demurred to, the judgment should not be reversed by reason of any defect in the pleading so demurred to. A pleading, when presented, is presumed to be sufficient, and it is the duty of a demurrant, if he thinks it insufficient, and desires to take advantage of it, at least to call the attention of the court to the defects or imperfections in such pleading; and, unless he does so, the court is authorized, under the statute, to make such failure to appear upon the record, and when it is made to so appear the action of the court in overruling the demurrer is conclusive as to him. The judgment of the circuit court complained of is affirmed.

Affirmed.

CHARLESTON

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WHIPKEY v. NICHOLAS *et al.*

Submitted June 22, 1899—Decided Nov. 18, 1899.

1. APPEAL AND ERROR—*Evidence.*

All assignments of error founded on doubtful and conflicting questions of evidence will be disregarded or overruled by this Court unless it is plainly manifest that the circuit court has erred against the true preponderance of the evidence. (p. 36.)

2. SPECIAL JUDGE—*Qualifications.*

A litigant who without objection joins in the selection of a special judge to hear and determine his case will not be permitted to raise mere technical objections to the selection and qualification of such judge after he has decided against such litigant. (p. 37.)

Appeal from circuit court, Calhoun County.

Bill by James E. Whipkey against George W. Nicholas and others. Decree for plaintiff. Defendants appeal.

Affirmed.

ROBINSON & PIERPOINT and J. W. FIDLER, for appellant.

LINN & HAMILTON, for appellee.

DENT, PRESIDENT:

At March rules, 1897, Calhoun County, James E. Whipkey filed his bill in chancery against G. W. Nicholas, alleging that by a certain contract in writing, bearing date the 15th day of December, 1890, the defendant sold him a certain tract of land, supposed to contain one hundred and sixteen and one-half acres, at nine dollars and twenty-five cents per acre, and agreed that a survey should be thereafter made, and if there proved to be a deficiency the amount was to be ascertained and deducted from the unpaid purchase money, and if there was a surplus the amount was to be added to the purchase price; that afterwards a deed had been executed by the defendant for the land, still with the same understanding; that plaintiff had about paid the purchase money, and had a survey made, which showed

that the tract only contained eighty-seven and five-eighths acres, and on this basis he owed the defendant less than sixteen dollars, which he tendered the defendant, and demanded his notes, and a release of lien, which defendant refused; and he prayed for such relief as he was entitled to in the premises. Defendant answered, admitting the contract, but claimed at the time the deed was made the old contract was mutually abrogated, and they orally agreed that the sale should be considered in gross, and not by the acre. Defendant also demurred to the bill for the reason that the contract was that the deed was to be made to Mary L. Whipkey and her heirs by said James E. Whipkey, and he insists that the said Mary L. Whipkey and her heirs should be parties plaintiff. This suit does not affect the title to the property, but is only a question of the reduction of the purchase money, in which said James E. Whipkey alone is interested. The demurrer was properly overruled.

The court below, on a hearing of the case, granted the relief prayed by the plaintiff, and from this decree defendant Nicholas appeals and relies on twelve different assignments of error, the first of which has been disposed of,—being the question raised by the demurrer. The next six relates to the action of the circuit court on the merits, and are to the effect that the finding of the court was contrary to the prepondenance of the evidence, which is to some extent conflicting. It is useless to repeat it all here. The appellant insists that the court erred in abating the purchase money and cancelling the notes, without allowing the appellant the privilege of rescinding the sale and refunding the purchase money, according to the holding in the case of *Pratt* v *Bowman*, 37 W. Va. 715, (17 S. E. 210). This was because there was an express agreement between the parties that in case there was a deficiency it should be ascertained, and deducted from the purchase price. *Pratt* v. *Bowman* only applies where there is no such agreement. Appellant says the agreement was abrogated. The court, from the evidence, reached a contrary conclusion; and, while there might be grave doubts as to whether such conclusion was right, yet this Court will not disturb it, unless contrary to the plain preponderance of the evidence. *Spurgin* v. *Spurgin*, 47 W. Va. 38, (34 S. E. 750(; *Yoke* v.

Shay, 47 W. Va., 40 (234 S. E. 748); *Fitzgerald* v. *Windmill Co.*, 42 W. Va. 570, (26 S. E. 315); *Richardson* v. *Ralphsnyder*, 40 W. Va. 15, (20 S. E. 854); *Smith* v. *Yoke*, 27 W. Va. 639; *Barlett* v. *Cleavenger*, 35 W. Va. 720, (14 S. E. 273). This Court is unable to say that the holding of the circuit court was plainly wrong as to this question, and any of the others presented, which depend on a preponderance of the evidence, such as that the sale was by the acre, and not in gross; that the plat and report of S. P. Bell furnished the proper basis for the determination of the amount of the land; and that there was only sixteen dollars due the appellant. This rule is too well established to be disregarded now, sustained as it is by both reason and authority.

The eleventh assignment of error relates to the question of tender before suit brought. The tender seems to be fully sustained by the evidence. and this assignment appears to have been abandoned in the argument.

The other four assignments relate to the selection, qualification, and constitutionality of the special judge. The constitutional question is settled in the case of *State* v. *Williams*, 14 W. Va. 851. An examination of the record reveals the fact that the appellant agreed in writing that N. M. Bennett should act as special judge in the case. He is therefore bound thereby, and cannot take any exception thereto that he might have otherwise taken. Any error committed therein is not to his prejudice. The decree of the circuit court is affirmed.

Affirmed.

CHARLESTON

SPURGIN v. SPURGIN.

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Submitted June 14, 1899—Decided Nov. 18, 1899.

APPEAL AND ERROR.

Unless plainly erroneous, the decrees of the circuit court will not be disturbed. (p. 33.)

Appeal from circuit court, Preston County.

Bill by Lucian Spurgin against Jesse Spurgin. Decree for plaintiff, and defendant appeals.

Affirmed.

P. J. CROGAN and NELL J. FORTNEY, for appellant.

W. G. WORLEY and C. P. GIRARD, for appellee.

DENT, PRESIDENT:

Lucian Spurgin filed his bill in the circuit court of Preston County against his father, Jesse Spurgin, claiming that about the year 1882, the time of plaintiff's marriage, his father, in consideration of love and affection, and services rendered since he became of age, to wit, the 30th of June, 1875, agreed to give him that portion of the home farm which lies between the Brandondville road, on the north, and Ami Moyer's farm, on the south, and between the Hazelton and Glade Farms road, on the east, and a private road leading from J. J. Moyer's, on the west, containing about one hundred and seventy-five acres; that with the aid of his father he built thereon a house worth about one thousand dollars, and immediately moved thereon and took possession of such land; that he put many improvements thereon, such as building a barn, corncribs, wagon sheds, summer kitchen, planting an orchard, and otherwise improving the land as a farm; that he continued to live thereon and make these improvements from the year 1882 up until the year 1893, when he removed to Uniontown, Pa., for the purpose of carrying on the butcher business, renting his

farm in the meantime to Mrs. Martha F. Smith. During all these years his father never disputed his right to the land, but constantly admitted it, and promised to make a deed for it. It is shown in evidence that in the meantime his mother died, and his father, who is now more than three score and ten, married his hired girl. By his first wife his father had three children,—two daughters and one son, the plaintiff. He now has a son by this second wife, and to the son and mother he has deeded the residue of the home farm,—about three hundred acres,—and all his personal property. The father answered, controverting the material allegations of the bill. Numerous depositions were taken by both parties, and the evidence is highly contradictory and conflicting. The father, in his testimony, denies everything except that his son continued to live with him from the time when he was twenty-one in 1875, until 1882, when he married. Then he built him a house on that portion of the farm in controversy, and permitted him to use the farm, up until he moved away, in 1893, when he (the father) claims to have rented it to Mrs. Smith. He contradicts, and is contradicted by, numerous witnesses. The circumstances are strongly in favor of the plaintiff's pretentions. Still, the case is not free from grave and serious doubt. A father has no right to raise hopes in the breast of a son, and thus secure his services for almost a score of years after his majority,—the very cream of his manhood,—and then cast him off without recompense because he (the father) has taken unto himself a new wife, with the expectancy of new heirs. While children should reverence their parents, parents should deal justly with their children. *Plate* v. *Durst*, 42 W. Va. 63, (24 S. E. 580). It is the settled law in this State "that a gift of land, based on meritorious consideration, by reason of which the donee has been induced to make valuable improvements will be enforced in equity by conveyance of the legal title." *Crim* v. *England*, 46 W. Va. 480, (33 S. E. 310). It has also been well settled that in doubtful cases the decree o the circuit court will prevail, as this Court never makes a "last guess," nor disturbes the decrees of the lower court unless plainly erroneous. *Yoke* v. *Shay*, 47 W. Va. 40, (34 S. E. 748). The court is unable to arrive at the conclusion in this case that the decree complained of is plainly errone-

ous, and therefore it must stand. The same principle applies to the motion for security for costs. The objection to the insufficiency of the description of the land is fully met in the case of *Crim* v. *England*, cited. For the foregoing reasons, the deree is affirmed.

Affirmed.

CHARLESTON

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YOKE *et al.*, *v.* SHAY *et al.*

Submitted June 19, 1899—Decided Nov. 18, 1899.

APPEAL AND ERROR.

A decree of a circuit court founded on conflicting and contradictory testimony will not be disturbed unless plainly erroneous. (p. 44)

Appeal from circuit court, Tyler County.

Action by A. J. Yoke and others. Judgment for plaintiffs. Defendants appeal.

Affirmed.

HALL & HALL and HUBBARD & HUBBARD, for appellants.

ROBT. MCELDOWNEY, T. P. JACOBS, V. B. ARCHER, and ERSKINE & ALLISON, for appellees.

DENT, PRESIDENT:

The case of A. J. Yoke and others against J. W. Shay and others, from the circuit court of Tyler County, involves the construction of the following lease, which is copied here because of its singular character: "Agreement made and entered into the ——— day of March, A. D., 189—, by and between Homer L. Bowser and Marietta Bowser, his wife, of first part, county of Tyler, and state of West Virginia, part— of the first part, and W. J. Steele and John

Mathews, party of second part, witnesseth, that the said parties of the first part, for and in consideration of the sum of one dollar to —— in hand well and truly paid by the said party of the second part, the receipt of which is hereby acknowledged, and of the covenants and agreements hereinafter contained on the part of the said party of the second part, to be paid, kept and performed, ha— granted, demised, leased, and let, and by these presents do grant, demise, lease, and let, unto the said party of the second part, his heirs, executors, administrators, or assigns, for the sole and only purpose of mining and operating for oil and gas, and of laying pipe lines and of building tanks, stations, and structures thereon to take care of the said products, all that certain tract of land situate in Ellsworth district, Tyler county, and state of West Virginia, on the waters of ——, bounded substantially as follows: On the north by lands of Briggs & Dundee & Leonard Roberts, on the east by lands of C. C. Fluharty, on the south by lands of John Wetzel and John Devaui, onthe west by lands of N. C. Fluharty and Joe Mercer, containing forty (40) acres, more or less; reserving, however, therefrom —— acres around the buildings, on which no well shall be drilled by either party except by mutual consent. It is agreed that this lease shall remain in force for the term of five (5) years from this date, and as much longer as the rent for failure to commence operations is paid, and as long after the commencement of operations as said premises are operated for the production of oil or gas. In consideration of the premises, the said party of the second part covenants and agrees: 1st, to deliver in the pipe lines to the credit of the first parties, their heirs or assigns, free of cost, the equal ⅛ (one-eighth) of all oil produced, and saved from the leased premises; and, 2nd, to pay three hundred dollars per year for the gas from each and every gas well drilled on said premises, the product from which is marketed and used off the premises,—said payment to be made on each well within sixty days after commencing to use the gas therefrom as aforesaid, and to be paid yearly thereafter. While the gas from said well is so used, it's agreed that said second party is to have gas free for operating three farms leased by second party at this date. First party is to have gas free for house purposes. Second

party covenants and agrees to locate all wells so as to interfere as little as possible with the cultivated portions of the farm, and pay all damages to growing crops by reason of operations: provided, however, that this lease shall become null and void, and all rights hereunder shall cease and determine, unless a well shall be completed on the said premises within —— from the date thereof, or unless the lessee shall pay at the rate of ten dollars ($10.00) per month in advance for each additional month such completion is delayed, from the time above mentioned for the completion of such well until a well is completed. Such payments may be made direct to the lessor, or deposited to his credit in Tyler County Bank, at Sistersville. A failure to operate said lease after said well is completed, or pay said rentals, for more than 30 thirty days, shall render this lease null and void, and all rights of the second party shall cease. There is no rental paid on this lease, or while drilling or operating said lease. It is agreed that second party shall have the privilege of using sufficient water from the premises to run all necessary machinery, and at any time to remove all machinery and fixtures placed on said premises, and, further, shall have the right at any time to surrender this lease to first part—for cancellation, after which all payments and liabilities to accrue under and by virtue of its terms shall cease and determine, and this lease shall become absolutely null and void. Witness the following signatures and seals: Homer L. Bowser. [Seal.] Marrietta Bowser. [Seal.] W. J. Steele. [Seal.] John Mathews. [Seal.]

"State of West Virginia, County of Tyler—ss: I, W. E. Van Camp, a notary public of said county, do certify that Homer L. Bowser and Marrietta Bowser, his wife, whose names signed to the writing above, bearing date the 9th day of March, 1897, has this day acknowledged the same before me in my said county. Given under my hand this the 9th day of March, 1897. W. E. Van Camp, Notary Public."

The plaintiffs claimed that they had fully complied with this lease, by a due payment of the rents provided for therein, while the defendants' lessor claims they had forfeited by failure to pay rents, and released the premises. The circuit court sustained the contention of the plaintiffs,

and perpetually enjoined all operators under the second lease. The defendants appeal.

Under the lease the plaintiffs began paying their rentals forty-one days after its delivery, by deposit to the credit of the lessor in the Tyler County Bank, in Sistersville, according to the provisions of the lease. The lessor insists that the payment of rentals should have commenced within thirty days. While there are some other minor questions urged, this is the only one presented worthy of the consideration of the Court. Counsel attempt to object to the manner of deposit, because of the way in which the bank kept its books. With this the plaintiff has nothing to do. The lessor in the lease designated the bank as the proper depository, and all the plaintiff was required to do was to make the deposit and leave the payment to the bank as it saw fit. The certificate of deposit was proper as evidence thereof, and counsel's objection thereto is frivolous.

This lease was written by the lessor himself. Hence the reasons given in *Bettman* v. *Harness*, 42 W. Va. 433, (26 S.E . 271), (36 L. R. A. 566), why an oil lease should be construed most strongly against a lessee, does not apply in this case, but the construction should be to the contrary. It shows on its face that it is not strictly a lease to search for and produce oil, but a lease to obtain rent. It provides that "this lease shall remain in force for the term of five years from this date, and as much longer as the rent for failure to commence operations is paid." By the payment of the rent the lease is to be continued indefinitely, though no effort is made to find oil or gas. The primary object is rent, not oil or gas. This provision is in the granting part of the lease. Afterwards it is provided: "However, that this lease shall become null and void, and all rights thereunder shall cease and determine, unless a well shall be completed on the said premises within ——from that date thereof, or unless the lessee shall pay at the rate of ten dollars ($10.00) per month in advance for each additional month such completion is delayed." This provision was undoubtedly intended to fix a period for the beginning of the payment of rent, and not that the parties had any idea a well would be completed within the period. The two other leases exhibited as made at the same time with the lease in controversy provide that a well shall be commenced

within thirty days, or the payment of rentals begun. To require the commencement of a well within thirty days is not unreasonable, but to require the completion of a well in such time is unreasonable, unless, in deference to, *Cushwa* v. *Association*, 45 W. Va. 490, (32 S. E. 259), it is held that "completion" means commencement. The wording of these leases in this respect is rather against than in favor of the lessor's pretention. They are oil leases, while his is distinctly a rent lease. His lease shows that he was after rent and not royalties. It was natural for him to want the rent to begin at once,—hence the blanks in the lease,—while the lessees would want as long time as possible to begin paying. The lessor says it was to be thirty days; the lessees, ninety. If thirty, why the blanks? The lessor wrote the contract. Why, if the time was so definite, did he not fill it in before signing? This question depends wholly upon contradictory testimony, and it is the established rule of this Court, in cases of doubt, not to disturb the decree of the circuit court. It is impossible to say that a wrong conclusion was plainly reached. Under the holding of this Court in the case of *Richardson* v. *Ralphsnyder*, 40 W. Va. 15, (20 S. E. 854), this appeal is without possible justification, and the decree is therefore affirmed.

Affirmed.

CHARLESTON

ZINN *et. al. v.* DAWSON *et. al.* 47 45 50 455

Submitted June 14, 1899—Decided Nov. 18, 1899.

1. JUDGMENT—*Injunction—Judgment Creditor.*
   The mere insolvency of a judgment creditor will not, of itself, justify an injunction against the enforcement of a judgment at law, in order to let in a set-off which might have been pleaded at law at the time such judgment was recovered. (p. 49.)
2. SET-OFF—*Equitable Relief.*
   When a party has been summoned to answer an action at law for the recovery of money and allows judgment by default to go against him, although at the time of such recovery he had judgments against the plaintiff which he might have pleaded as a set-off, he cannot, on the ground that he mistook the time at which the case was to be tried, combined with the fact of the insolvency of the plaintiff, come into equity to obtain the benefit of such set-off. (p. 49.)
3. SET-OFF—*Judgment—Pleading.*
   A party is not compelled to plead a set-off in such an action, and if judgment is obtained against him, and he holds judgments against the plaintiff, he may, on motion in a court of law after notice, have his judgment set off against the plaintiff's judgment. (p. 49.)

Appeal from circuit court, Preston County.

Bill by Harrison Zinn and others against M. W. Dawson and Lloyd C. Shaffer. Decree for plaintiffs. Defendants appeal.

Reversed.

P. J. CROGAN, for appellants.

JAMES A. BROWN and JOHN W. MASON, for appellees.

ENGLISH, JUDGE:

Harrison Zinn, Lorenzo M. Zinn, Milford C. Gibson, and T. F. Lanham filed their bill in the circuit court of Preston County against M. W. Dawson and Lloyd C. Shaffer, sheriff of said county, praying an injunction to restrain said Shaffer and Dawson from collecting certain executions set forth and described in their bill in favor of said Dawson.

It appears from the pleadings in this cause that the defendant Dawson, at the March term, 1897, of said court, obtained a judgment by default against the plaintiffs Harrison Zinn and Lorenzo M. Zinn for seventy-nine dollars and forty-five cents, and a judgment against the plaintiffs Harrison Zinn, M. C. Gibson, and T. F. Lanham for one hundred and one dollars and forty-one cents, and twenty-four dollars and sixty-five cents costs, and that executions were issued and levied on both of said judgments; that the plaintiffs obtained an injunction restraining Dawson from collecting his said judgments, or either of them, alleging that Dawson was insolvent, and claiming that the plaintiffs Zinn and Gibson were the owners, by assignment, of three judgments upon which executions had been issued, then in the hands of the officers, which judgments were against said Dawson; praying that their judgments might be set off against the judgments of Dawson, and alleging that they would have been filed and pleaded as an offset at the time said judgments were obtained by Dawson but for the fact that they mistook the time when the matters upon which said judgments are founded were to be passed upon and decided on the law side of the court. An injunction was granted as prayed for, and an amended bill filed, in which the plaintiffs, among other things, alleged that they had asked the sheriff to balance the said executions, which he declined to do. The defendant Dawson demurred to the plaintiffs' bills, and filed his answer thereto, denying every material allegation, and the plaintiffs filed a special replication. On September 11, 1897, said demurrer was overruled, and the motion to dissolve the injunction also overruled, the court holding that the plaintiffs were entitled to have their executions set off and balanced against the executions in favor of the defendants, and referred the case to a commissioner, who made report, which was excepted to by the defendants. In the final decree the court confirmed the commissioner's report, balanced and set off the plaintiff's executions against the defendants, and also deducted the costs of this chancery suit from the defendants' judgments, and found a balance of fourteen dollars and seven cents due Dawson, for which execution was directed to issue in his favor. From this decree said Dawson obtained this appeal.

Can we sustain the action of the court in overruling the defendants' demurrer to the plaintiffs' bill and amended bill? Looking at the case thereby presented, were the defendants entitled to the relief prayed for in a court of equity? One of the grounds relied on by the plaintiffs in support of their prayer for an injunction and general relief is that the defendant Dawson is notoriously insolvent, and that he intended to schedule against the executions then in the hands of the sheriff in their favor. This question was presented to this Court in the case of *Sayre's Adm'r* v. *Harpold*, 33 W. Va. 553, (11 S. E. 16), where it was held that "the mere insolvency of a judgment creditor will not, of itself, justify an injunction against the enforcement of a judgment at law, in order to let in a set-off which might have been pleaded at law at the time such judgment was recovered." The plaintiffs in this case seek to excuse themselves for their failure to make their defense at law by filing and proving their set-off by alleging that they were mistaken as to the time when the matters upon which said Dawson's judgments are founded were passed upon by the circuit court on the common-law side. This fact, however, would not confer jurisdiction on a court of equity, as will be seen by reference to the case of *Shields* v. *McClung*, 6 W. Va. 79,—a case in which Haymond, president reviews the authorities bearing upon the point, and holds that "a party to whom a day and opportunity have been allowed to make his defense against a demand set up against him in a court of law, but who has wholly failed to avail himself of them, will not be entertained in a court of chancery on a bill seeking relief against the judgment which has been rendered against him in consequence of his default, upon grounds which might have been successfully taken in the court of law, unless some reason, founded in fraud, accident, surprise, or some adventitious circumstances beyond the control of the party, be shown why the defense was not made in that court." The excuse offered in that case for failure to make the defense at law was that the suit was brought in Greenbrier County; that the defendant resided in Kanawha County, and as soon as he was served with process he sought by letter to employ an attorney to defend his case, and thought he had done so, but was under a misapprehension as to the term at which the

case would be called for trial, and the attorney he had spoken to, not understanding that he had been definitely retained, failed to appear and make defense, and judgment was rendered against him. On this state of facts, this Court held the defendant was not entitled to equitable relief. To the same effect, see *Knapp* v. *Snyder*, 15 W. Va. 434; *Alford* v. *Moore's Adm'r*, Id. 597; *Meem* v. *Rucker*, 10 Gratt. 506. See also, *Hudson* v. *Kline*, 9 Gratt. 379, where it was held (first point of syllabus): "In an action at law, the defendant is prevented by unavoidable accident from setting up offsets which he held against the plaintiff, these offsets being in no way connected with the debt sued upon. He has, however, a plain remedy at law for the recovery of his claims. Held, he is not entitled to enjoin the judgment, and set up his offsets against it, but must pursue his remedy at law for their recovery." In that case Hudson had employed counsel to make his defense, and was taken suddenly ill while in the town in which the court house was located, and could not for that reason appear, and yet this state of facts was not considered sufficient to allow him to go into equity for relief. The case of *Faulkner's Adm'x* v. *Harwood*, 6 Rand. (Va.) 125, is quoted with approval by Lee, J., in *Slack* v. *Wood*, 9 Gratt. 43. In the first named case it was held that, "after a trial at law, a court of equity will not grant a new trial merely because injustice has been done, but the party applying for the new trial must show that he has done everything that could be reasonably expected from him to obtain relief at law." In the case at bar the appellees had been summoned, and were in court, and should have informed themselves as to the time the case would be heard, and their failure to do so affords no valid excuse for omitting to put in their defense at law. That one judgment may be set off against another, and the larger one discharged *pro tanto*, see *Skirne* v. *Simmons*, 36 Ga. 402; also *Scott* v. *Rivers*, 1 Stew. & P. 24, where it was held that "courts of law, in the exercise of legitimate and incidental powers, have authority to authorize the set-off of one judgment against another, existing between the same parties in the same court." The practice in this matter of setting off judgments is indicated in 2 Freem. Judgm. § 467, where it is said: "The satisfaction of a judgment may be wholly or partly produced by compelling the judgment

creditor to accept in payment a judgment against him in favor of the judgment debtor, or in other words, by setting off one judgment against another. This is usually brought about by a motion in behalf of the party who desires to have his judgment credited upon, or set off against a judgment against him. The court, in a proper case, will grant the motion. Its powers to do this cannot be traced to any particular statute, and exists only in virtue of its general equitable authority over its officers and suitors,"—citing numerous authorities. See, also, Wat. Set-Off, §§ 345, 346.

Now, even if the plaintiffs were honestly mistaken as to the time when the action at law against them was to be heard, and for that reason failed to set off their judgments at the trial, yet here is a plain, complete, and adequate remedy at law, by which they could, on motion, have had their judgments set off against the judgment of plaintiff, Dawson, and for that reason they should not have been entertained in a court of equity. In the case of *Faulconer* v. *Stinson*, 44 W. Va. 549, (29 S. E. 1011), this court says: "But in *Sayre's Adm'r* v. *Harpold*, 33 W. Va. 553, (11 S. E. 16), it is held that mere insolvency of a judgment debtor will not alone justify an injunction to a judgment to let in a set-off which might have been pleaded; this seems well settled,"—citing High. Inj. § 132; Bart Ch. Prac. 22; *Hadson* v. *Kline*, *supra*. Barton, in his Chancery Practice (page 22), quotes from the opinion of Staples, J. (*Linke* v. *Fleming*, 25 Gratt. 707), as follows: "A very interesting question has been raised and discussed by the learned counsel in this case. It is whether the insolvency of a judgment creditor is a sufficient ground for a court of equity to decree a set-off against him upon which the debtor might have successfully relied by way of defense in the action at law, but which he failed to do, without any circumstances of excuse for such failure. This question has never been settled in this court, nor can it be considered as settled by the decisions of foreign courts." And Mr. Barton adds: "The generally received opinion is that where the party had his opportunity to the set-off at law, and gives no excuse for not having done so, the mere fact of insolvency will not entitle him to relief in equity against the judgment." In the case at bar the insolvency of Dawson cannot be regarded as material, for the reason that his

judgment was the largest, and the plaintiffs' judgments would only be set-off *pro tanto*; and, if the judgments had been set off at law, the plaintiffs could not have been injured by the insolvency of Dawson, as they would not have to resort to Dawson's property for any balance.

Applying these principles to the facts in this case, my conclusion is that the mere insolvency of Dawson, in the circumstances, did not entitle the plaintiffs to relief in equity. Neither was the excuse offered to account for their failure to plead their judgments as a set-off in court of law sufficient to entitle them to the relief prayed for. The court erred in overruling the demurrer to the plaintiffs' bill, and perpetuating the injunction. The decree complained of is therefore reversed, and the bills dismissed.

Reversed.

CHARLESTON.

SPRINGSTON *et al. v.* MORRIS *et al.*

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Submitted June 17, 1899—Decided Nov. 18, 1899.

1. DECREE—*Recitals.*
   The recitals of a decree which is directly attacked for fraud and surprise in the procurement are not presumed to be absolute verities, but are subject to impeachment. (p. 53.)

2. DECREE—*Impeachment.*
   A decree of confirmation founded on a false report of sale made may be impeached by an interested party guiltless of culpable fraud or neglect. (p. 52.)

3. DIMINUTION OF RECORD.
   A litigant suggesting a diminution of the record, and obtaining from this Court a writ of certiorari, must have the alleged omitted portions of the record copied at his own expense, and the certiorari will be regarded as abandoned on his refusal to do so. (p. 55.)

Appeal from circuit court, Ritchie County.

Bill by America J., and J. B. Springston against P. W. Morris, A. J. Patton, and B. F. Ayres. Decree for defendants, and plaintiffs appeal.

Reversed.

H. C. SHOWALTER, for appellants.

B. F. AYERS and P. W. MORRIS, for appellees.

DENT, PRESIDENT:

America J. Sprinsgton and J. B. Springston, her husband, filed their original bill in nature of a bill of review, in the circuit court of Ritchie County against the administrator of the estate of S. D. Webb, deceased, and others, in which it is alleged: That the said America J. Springston is an heir at law and distributee of the estate of said S. D. Webb deceased. That in said court about the 1st day of May, 1891, one J. R. Sigler filed a general creditors' bill against the three heirs of said Webb to ascertain the debts, and the property liable to the payment of the same, and enforce the sale thereof. The debts and property were ascertained by reference to a commission, and a decree was entered directing a sale of two tracts of land, one containing one hundred and eighty-three and a half acres. and the other five acres; and also an order was entered consolidating said cause with another suit instituted by H. E. McGregor. and to enforce a judgment lien against J. V. Webb, who was an heir at law of S. D. Webb, deceased. That the special commissioners, H. Peck and B. F. Ayres, advertised and sold the said one hundred and eighty-three and a half acres of land on the 1st day of the June term of court, 1893 (being the 20th day of June), to A. J. Patton and R. W. Morris at the price of five hundred and fifty-one dollars. The report of sale was returned by one of the special commissioners (Ayres), to which the plaintiffs took exceptions for inadequacy of price, and filed affidavits to sustain the same, showing the land to be worth at least one thousand two hundred dollars. Plaintiffs also made an upset bid of seven hundred dollars, and filed a bond to secure the same; and the plaintiffs understood the sale would be set aside, and the cause continued until the next term of court. That with this understanding the plaintiff

J. B. Springston, who was present, representing his wife's interest, returned to their home, which was about sixteen miles from the court house. That, after court adjourned, plaintiffs learned for the first time that on the 29th day of June, 1893, a decree had been entered under a new report of said commissioner, Ayres, in which he reported that the said land was sold on the 20th day of June, 1893, to the same purchasers at the price of seven hundred and ten dollars, confirming such sale, and awarding a writ of possession. The plaintiffs charge that this decree was obtained by collusion and fraud between the commissioner and said purchaser, and without the knowledge or consent of plaintiffs. They also object to a certain sum of twelve dollars and thirty-four cents allowed to J. R. Sigler, which was barred by the statute of limitations, and also to the consolidation of the two causes. As to the consolidation of the two causes, it is hardly necessary to say that this was improper, especially if the costs of both suits were paid out of the estate of S. V. Webb, deceased. Otherwise, it would not prejudice the rights of the plaintiffs. This, however, is not clear from the bill. Such questions, and others not here disposed of, if found necessary, can be brought to the attention of the court when this cause is remanded. The defendant B. F. Ayres, commissioner, and the purchasers, A. J. Patton and P. W. Morris, answered the bill, but wholly disregarded the allegations as to the two reports of sale, the upset bid, and bond filed; but they deny fraud and collusion, and rely on the decree of confirmation and recitals as a verity that cannot be impeached. The circuit court decided in their favor, and dismissed the bill at plaintiffs' costs. From this decree plaintiffs appeal, and assign as error the dismissal of their bill.

Defendants insist that the plaintiffs have no right to question the recitals of the decree confirming the sale. *State* v. *Vest*, 21 W. Va. 796. This is not the rule where a decree is directly impeached for fraud or surprise in its procurement. It may be an absolute verity as to what occured in court and was there recorded, but not as to the recitals therein contained as to what occurred other than in the presence of the court at the time of the entry of the decree, Black. Judgm. § 238. If such rule were to be held good in all cases, no decree could be impeached for

fraud or surprise; and yet such is ordinary equity jurisdiction. Bart. Ch. Prac. (2d Ed.) p. 841. The doctrine of the absolute verity of the record must always yield to that higher equitable doctrine that fraud vitiates all things. "It is the just and proper pride of our mature system of equity jurisprudence that fraud vitiates every transaction; and however men may surround it with forms, solemn instruments, proceedings conforming to all the details required in the laws, or even by the formal judgment of courts, a court of equity will disregard them all, if necessary, that justice and equity may prevail." *Warner* v. *Blakeman*, 43 N. Y. 507; Freem. Judgm. § 489. The proper way in which to attack such a decree, when the object is merely to set aside the decree, and then permit the original suit to continue to final hearing, is by an original bill in the nature of a bill of review. *Manion* v, *Fahy*, 11 W. Va. 482. So the plaintiffs' bill must be regarded. *Stuam* v. *Fleming*, 22 W. Va. 404. The object of the original part of the bill is to set up new matter, not in the record, impeaching the recitals of the decree. As in this case the plaintiffs allege that the land was sold on the 20th day of June, 1893, to Patton and Morris at the price of five hundred and ten dollars; that Commissioner Ayres made the report to this effect to the court; that on the 26th day of June plaintiffs indorsed exceptions thereon for inadequacy, and filed an upset bid, offering seven hundred dollars with bond and security; that the bond was accepted in open court, and the judge made the announcement from the bench that the sale would be continued until the October term, and then stated the upset bid; that after the plaintiffs, laboring under the belief that, the sale was continued, had left court and returned to their homes, the commissioner of sale made a new report to the court, that he had sold the land to the same purchasers at the price of seven hundred and ten dollars on the same day the other sale was made, to wit, the 20th day of June, and had a decree entered confirming such sale. These allegations attack the second report of the commissioner as being false and untrue, and made and procured by the commissioner and alleged purchasers in fraud of plaintiffs' rights, and that the decree formed thereon was invalid because thereof. These allegations are fully sustained by the proofs and the

record other than the decree, and in fact they are not otherwise controverted by the defendants in their joint answer, but are virtually admitted. This is a practice that should be severely discountenanced by the circuit court, as without legal justification, and fraudulent as to parties, who have no notice thereof and do not consent thereto. A special commissioner is the representative of the court, and should at all times deal honestly and openly with its litigants and the court itself, and not deceive either the one or the other by questionable practices. The commissioner, in his brief, attempts to justify his conduct with this language: "On the first day of the term the land was sold to A. J. Patton and P. W. Morris, as appears from what is called the 'Report', found in * * * the record. There were exceptions taken to it, and affiant and the exceptor were trying to get the sale set aside and postponed until the first day of the next term, when he offered to bid the sum specified in his affidavit; but the court ruled that the purchasers had a right to increase their bid made on the first day of the term to $710, if they saw fit to do so. The man who filed the upset bid was absent, and no one offered any more for him, and all further objections to the sale were tacitly waived, and it was reported at $710, as of the 20th June, 1893; and there were no exceptions taken whatever to the confirmation by the court, and the court's record recites the truth when it says that "it came on to be heard without any exception.' " There is neither allegation nor proof that the exceptor was trying to get the sale set aside and postponed until the first day of the next term of the court, but the allegation and proof is that the sale had already been set aside and postponed until the next term, except in so far as the entry of a formal order was concerned. Nor is there allegation or proof that the court ruled that the purchasers might increase their bid made on the first day of the term to seven hundred and ten dollars, and if such was done in open court it would not have been necessary to make out a new report, dating it as of the first one; and the court would not, certainly, permit the biddings to be opened without notice to the parties most interested, or their attorneys. Such would be an erroneous practice. If done, the record should show it. The dealings of a court with a subject-matter before it

should be open and public, without concealment or deception, taking advantage of the absence of interested or innocent parties, whose absence is caused by prior oral and apparently final rulings of the court touching the same matter; and this always will be presumed in favor of the court unless the contrary is shown. Unless plainly apparent, the court cannot be held responsible for wrong conduct on the part of its officers. And it cannot be presumed that if the court knew the facts it would permit a commissioner of sale to falsify his report, as was done in this case, to the injury of an absent litigant. The purchasers may be entirely free from blame in the matter; but, when it was brought to their attention by plaintiffs' bill, they should have been prompt, eager, and willing to decline to be benefited by the unconscionable advantage they had obtained by reason of the confiding and innocent absence of the plaintiffs, instead of tenaciously clinging thereto behind supposed legal barriers. This would have entirely freed them from the charge of collusion.

The motion to dismiss for failure to print the omitted portions of the record will be overruled, from the fact that such portions of the record are not before this Court for its inspection. Affidavits cannot supply the place of the records, and the court will not act upon them, but only from self-inspection on return of the certiorari. It appears that the clerk of the circuit court would not copy them, for the reasons that neither party would pay him therefor. It is a rule of this Court, that the party applying for the writ of certiorari must pay for the copying of the alleged omitted portions of the record, and if he refused to do so, that this will amount to a waiver of the writ, and be so regarded.

For the foregoing reasons the decree of the circuit court dismissing the plaintiffs' bill is reversed and annulled at the costs of the appellees Ayers, Morris, and Patton; and the order entered by it on the 29th day of June, 1893, in the case of Sigler and others against Musgrave and others, confirming the alleged sale of the one hundred and eighty-three and one-half acres of land, is also set aside, reversed, and annulled, and this cause is remanded to the circuit court to be further proceeded in according to the rules and principles governing courts of equity.

Reversed.

CHARLESTON.

CRAMER v. POMEROY *et al.*

Submitted June 17. 1899—Decided Nov. 18, 1899.

1. APPEAL AND ERROR—*Evidence.*

When the question is whether a fact has been established by the evidence, either directly or inferentially, in favor of the demurrer, a fair test is furnished by the inquiry, would the court set aside the verdict, had the jury, on the evidence, found the fact? (p. 57.)

2. GAMING—*Justice of the Peace.*

A case in which the testimony shows that the plaintiff lost to the defendants, betting at faro, within twenty-four hours, two hundred and seventy dollars, and paid or delivered the same to them, and was entitled to recover it back by suit before a justice of the peace. (p. 58.)

Error to circuit court, Tyler County.

Action by John C. Cramer against Daniel Pomeroy and A. H. Simons. Judgment for plaintiff. Defendant brings error.

Affirmed.

B. T. BOWERS, for plaintiffs in error.

F. L. BLACKMARR, for defendant in error.

ENGLISH, JUDGE:

This was a civil action brought by Cramer against Pomeroy and Simons before a justice of the peace in Tyler County to recover from the defendants two hundred and seventy dollars, which was lost by him on December 24, 1895, in a gambling house belonging to said defendants, in the town of Sistersville, W. Va., known as the "Manhattan," in the game of faro. Judgment was rendered for the plaintiff for two hundred and seventy dollars, costs, and interest thereon until paid. The defendants appealed to the circuit court. The case was tried in that court before

a jury. There was a demurrer to the evidence, and the matters of law arising upon said demurrer, being submitted to the court, were found for the plaintiff, and judgment was rendered against the defendants and their surety in the appeal bond for two hundred and eighty dollars and ten cents, with interest from the 29th of April, 1897, until paid, and costs. Thereupon the defendants moved the court to set aside the conditional verdict and judgment aforesaid, and grant them a new trial, for the reason that the same was not sustained by either the law or the evidence, which motion was overruled. The defendants excepted and took a bill of exceptions setting forth the testimony, and obtained this writ of error.

The plaintiffs in error claim that the circuit court erred, in its rulings upon the demurrer to the evidence, in rendering a joint judgment against Pomeroy and Simons unless from the evidence both were jointly winners of the money lost by plaintiff, and that the evidence does not show that the defendant Simons was the winner, or that he had any thing to do with the game at which the money was lost. In the case of *Clopton's Adm's* v. *Morris*, 6 Leigh, 278, it was held tnat on a demurrer to evidence the demurrant waives all his own evidence that at all conflicts with that of the other party, admits the truth of his adversary's evidence, admits all inferences of fact that may fairly be deduced from that evidence, and submits it to the court to deduce such fair inferences. See *Muhleman* v. *Insurance Co.*, 6 W. Va. 508; also, *Ware* v. *Stephenson*, 10 Leigh, 165, where Stanard, J., delivering the opinion of the court, said: "When the question is whether or no a fact ought to be taken as established by the evidence, either directly or inferentially, in favor of the demurrer, I do not know a juster test than would be furnished by the inquiry, would the court set aside the verdict, had the jury, on the evidence, found the fact? If the verdict so finding the fact would not be set aside, it ought to be considered as established by the evidence demurred to." In the case at bar only one witness was introduced, and he was the plaintiff, and from his testimony it appears that the defendants seemed to own the gambling house in which the money was lost; that he was invited to the place by Pomeroy, one of the defendants, and by him was given the

key to the room usually kept locked, "where the nice people play;" that he knew the proprietors, and knew how they did business, and had seen them at times, when the games closed, take the money from the gaming tables and the faro bank, count it, set down the amount in a book, put the money in bags, and deposit it in the safe in the front room; that he had seen the defendants put money in the safe, and go to it and get money; that they had the keys to the safe. On the evening the plaintiff lost this two hundred and seventy dollars, the defendant Pomeroy and Fred Papaugh dealt, and took the money that plaintiff lost, and put it in a drawer of the faro bank which was operated in the said gambling house. How Papaugh happened to be dealing faro on that particular evening does not appear. This testimony was evidently elicited by questions propounded to the witness, and when he states, in the conclusion of his testimony: "It was generally understood that tney kept the house. I never saw any one else there, except them doing anything or exercising any control over the place,"—it is evident that he did not mean Pomeroy and Papaugh, but meant Pomeroy and Simons, the defendants, who, as he had before stated, collected the winnings from the faro bank and other gaming tables, deposited them in the safe, and carried the keys. The money lost by plaintiff went into the drawers of the faro bank, and the necessary inference from that and the other testimony is that the defendants received the money lost, although Simons was not actually present when it was lost by plaintiff. Applying the test indicated by Judge Stanard in *Ware* v. *Stephenson*, *supra*, if this case had been left to the jury, and a verdict had been returned for the plaintiff, we could not have set it aside. The whole testimony, considered together, shows that the defendants were running this gambling house, and the money lost went into their money drawers; and for that reason we cannot disturb the finding and judgment of the court, which is affirmed.

Affirmed.

CHARLESTON.

UHL v. OHIO RIVER R. CO.

Submitted June 21, 1899—Decided November 28, 1899.

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1. WAY OF NECESSITY—*Natural Gas—Pipe Lines.*

If a land owner conveys a right of way through his farm in fee to a railroad company, and years afterwards natural gas is found on his lands situated on the further side of such right of way from his residence, the law will imply a way of necessity by which he may pipe such gas to his residence for use therein; the pipes to be so laid and constructed as not to interfere in any wise with such railroad company's proper use and occupation of its right of way. (p. 61.)

Appeal from circuit court, Wood County.

Bill by C. D. Uhl against the Ohio River Railroad Company. Decree for defendant, and plaintiff appeals.

Reversed.

McCLURE & FORRER, for appellant.

H. P. CAMDEN, for appellee.

DENT, PRESIDENT:

C. D. Uhl appeals from a decision of the circuit court of Wood County dissolving an injunction obtained by him against the Ohio River Railroad Company in words as follows: "To restrain, inhibit, and enjoin the Ohio River Railroad, its agents, employes, attorneys, and servants, from interfering with complainant's use of his crossing in laying pipe lines over the right of way of said railroad company to complainant's residence, to run through same gas and oil produced from complainant's land lying between said railroad and the Ohio river, but to be so laid or constructed as not to interfere in anywise with said railroad company's use and occupation of its road, its rails, crossties, track, or operation of its said railroad, until the further order of the court." The admitted facts are as follows: The appellant on the 13th day of April, 1882, granted a strip of land fifty feet wide, dividing his farm to

the appellee, as a right of way for its railroad, without reservation, except, as a part of the consideration, that the grantee should make a good roadway or crossing where the private road of said Uhl crosses said railroad, and also put in or build cattle stops wherever said railroad comes from one field to the other. This grant has been held, in this Court, in a case decide herewith between said parties, to invest the appellee with the fee simple of said strip of land. The appellant at the time of his grant knew nothing with regard to his land being underlaid with oil and gas, and made no reservation respecting the same. Gas in paying quanties has been found on the land on the opposite side of the right of way from his dwelling house, and appellant sought to convey it under the railroad through a pipe for use at his residence. The appellee refused to permit him to do so, and he obtained this injunction. He claims the right to do so (1) because of the roadway or crossing before mentioned; (2) by implication of law, through necessity. It would not, certainly, come under the first, for the reason that this is a crossing over a railroad, and was intended to be the customary farm roadway. No thought was had of gas or oil at the time of its reservation, and no provision was made in relation thereto. And it cannot be said the parties had in contemplation at that time things that in no wise entered their minds, and of which they were both equally and entirely ignorant. There is no doubt but what the appellant, if he had then entertained, even the remotest prospects of gas and oil developments, would have made every necessary reservation in relation thereto. Is there a way implied by necessity? Certainly not as to the oil, for it can be secured in barrels or tanks, or reduced to such condition that it can be transported across the present roadway without the use of an underlying pipe line. At least, there is nothing to show such necessity disclosed by the record. Gas is entirely different. The only way it can be conveyed from one point to another, so as to be of practical utility, is through confinement in pipes. Otherwise, it is lost, although when properly conveyed, and used for heating and lighting, it is of the greatest value and comfort. It is being produced on the appellants' land. He cannot convey it to his dwelling house, and get the benefit of it, without crossing the right

of way donated by him to the appellee. The appellee refuses to allow him to do so, for love or money, except probably at an exorbitant price. The excuse is that it will endanger the running of its cars. The Court will take judicial notice of the fact (being common knowledge to all men) that gas can be so confined in pipes that it can be transported across this right of way in a perfectly harmless manner. In Jones, Easem. § 315, it is said that: "A right of way is never implied because it is convenient. It must be necessary for the reasonable enjoyment of the estate."—that is, the beneficial use and enjoyment. And in section 319: "But the fact that one has a right of way by grant or reservation, for a limited or special purpose, does not debar him from a way of necessity for all purposes." "A way of necessity arises by an implied reservation, * * * as well as by an implied grant." Section 306. It "presumes an understanding of the parties that one selling a portion of his land shall have a legal right of access to the remainder over the part sold, if he can reach it in no other way." "Even where one conveys to a railroad company a right of way through his land, he has a way of necessity over the land conveyed, so as to reach a part that is cut off by the railroad." Section 307. "The prevailing view in this country is that a way of necessity is not limited to such use of the land granted as was actually made or contemplated at the time of the conveyance, but is a way for any use to which the owner may lawfully put the granted land at any time." Section 323. "The way implied is usually one for all purposes for which the grantee may need to use it for the full enjoyment of the property conveyed" or retained. Section 324. "Such ways are implied in direct contradiction to the grantor's covenants of general warranty." Section 305. The implication of necessity is a mere fiction of the law for public policy, to secure to the owner the full enjoyment of his estate in grant or reservation, and which he would be otherwise entirely deprived of by the pure obstinacy of his grantor or grantee. This is a plain case of a dog in the manger. What it cannot eat it will not let others eat. It is certainly a matter of gratification that the law permits the polite removal of the obstruction. The cases relied on by appellee's counsel are not against, but rather in favor

of, this conclusion. The principal case of *United States Pipe-Line Co.* v. *Delaware, L. & W. R. Co.*, (N. J. Err. & App.) 41 Atl. 759, 42 L. R. A. 572, was an attempt by the pipe-line company to lay a pipe line for public use through the right of way of a railroad company, by reason of a private right of way reserved by the adjacent landowner. The court held that this could not be lawfully done, for the reason that: "The laying of these pipes in the roadway in no sense conferred a benefit on the lands to which the way was appurtenant, nor were the pipes adapted to facilitate or promote access between the two parcels of land to which the easement was appurtenant. They extend under ground the entire distance of the way, and are designed to be used as a part of a pipe line for the purpose of conveying oil." The injunction in this case limits the pipe line "to facilitate or promote access between the two parcels of land to which the easement was appurtenant," and it confers "a benefit on the lands," and is an absolute necessity to their reasonable and proper enjoyment by the owner thereof. For these reasons the judgment of the circuit court is reversed, the injunction is so modified as to strike out the words "and oil," making it apply to gas alone, and the cause is remanded to the circuit court to be further proceeded in according to the rules and principles governing courts of equity.

BRANNON, JUDGE:

I concur for the reason that I think the crossing reserved in the right of way deed gives the right to put in the piping. Though such a use of that crossing may not have been dreamed of at the date of the deed, yet the crossing was for use for any purpose which might thereafter be called for in the conveyance from the land of its products—whether a wagon carrying wheat or coal, or a pipe or other appropriate means of carrying gas—so it did not practically impair the use of the right of the railroad to use its track. If you say this reserved crossing does not include the right to this pipe easement, because it was not thought of, then how can you concede the right for the same use at other points in the line of right of way? Neither was it thought of then. It grows only from implication. Counsel, after I had written this note, cited *United States Pipe-Line Co.* v. *Delaware, L. & W. R. Co.* (N. J. Err. & App.) 41 Atl. 759, 42 L. R. A. 572, to show that, under a right of way reserved, an oil pipe cannot be laid; but that was where a third party wanted to lay it for conveyance of oil for the public, not an owner of land to convey the product of his land, for which the right was reserved. It may be that, if that res-

ervation of a crossing were absent, there would be a right of way of necessity. In *Watts* v. *Railroad Co.*, 39 W. Va. 203, (19 S. E. 521) 23 L R. A. 674, I indicated that where no crossing is reserved none exists; but that opinion did not relate to a way of necessity. Where there is no other ingress or egress, save over the track, a way of necessity may exist; but, it not being necessary to base the decision on that, I prefer to reserve that question. 3 Elliott, R. R , § 1138, questions whether a grant of a strip for a railroad gives impliedly a right to a crossing between the parts of the land severed by it, by implication. I do not think it would for mere convenience. It might from necessity. It is as clear that a way of necessity may be regarded as reserved by implication to one who conveys one tract, or part of one, retaining the other or balance, as it is conferred by implication in favor of a grantee under proper circumstances. See cases cited in Jones, Easem. §§ 306, 307, 3 Elliott, R. R. supra; *Carbrey* v. *Willis*, 83 Am. Dec. 688, and note; *Elliott* v. *Rhett*, 57 Am. Dec. 750, and full note. Can the party make a pipe line wherever he chooses, and endanger the road?

Reversed.

CHARLESTON.

POTTS *v.* FITCH *et al.*

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Submitted June 17, 1899—Decided November 28, 1899.

1. TRUST—*Fraud.*

F. agrees with P., L., and T. that they shall jointly acquire an oil lease on 10 acres of land, which he represents will cost an oil lease on ten acres of land, which he represents will cost forty dollars, and that they shall share equally in the expenses and $40, and that tney shall share equally in the expenses and profits of said leasehold. F. takes the lease in his own name, and, becoming aware that a valuable oil well had been drilled near by, when about to assign to P. his proportion of the lease he falsely represented to him that he had already assigned one-half thereof to L., and thereby induced said P. to accept as his share one-eighth instead of one-fourth, which he did under protest, and paid for it. Under this state of facts F. was a trustee for P., L., and T., and by reason of the fraud should not be allowed to retain the one-eighth which he withheld from P. (p. 67.)

2. STATUTE OF FRAUDS.

Such a trust is not affected by the statute of frauds. (p. 69.)

Appeal from circuit court, Wetzel County.

Bill by M. B. Potts against W. R. Fitch and others. Decree for defendants, and plaintiff appeals.

Reversed.

HALL & HALL, for appellant.

E. B. SNODGRASS and T. P. JACOBS, for appellees.

ENGLISH, JUDGE:

M. B. Potts brought a suit in equity in the circuit court of Wetzel County against W. R. Fitch, F. P. Lowther, E. J. Thompson, and Henry Oil Company, a corporation, and filed his bill at August rules, 1897, in which he claims that he and the defendants entered into an agreement to procure a lease for oil and gas purposes on a certain tract of land of about ten acres situated in Tyler County, W. Va., that said parties were to share equally in the expenses and profits of same; that said Fitch attended to taking the lease, and took it in his own name; that at the time said agreement was made an oil well was being put down in the immediate vicinity, known as "Wood's Well No. I;" that, after said Fitch was advised that Wood's well had been drilled, and was a producer, but before plaintiff was aware of the fact, he met Fitch, in the presence of said E. J. Thompson, and sought to obtain an assignment of one-fourth of the lease in accordance with the contract. Fitch, however, represented to plaintiff that he had already given to said Lowther, his father-in-law, an undivided half interest in the lease, leaving himself at that time only one-fourth interest, and that, if he assigned one-fourth of the lease to plaintiff, he would be left without any interest; which statement was false, as plaintiff afterwards learned. The plaintiff, relying on said false statement, agreed to accept one-eighth which was assigned to him, and paid his proportion of the money therefor, and received said eighth, protesting that he was entitled to one-fourth of the entire lease. The plaintiff also alleges that at the time the one-eighth interest was assigned to him said Fitch held three-eighth. Lowther one undivided one-fourth, and Thompson an undivided one-fourth, and that Fitch's statement to him that he had conveyed one-half interest to Lowther, and, if he conveyed one-fourth interest to plaintiff, he would have

no interest left, was false. He also alleged that he had always been ready and willing to pay Fitch or any other person entitled to the said purchase price, or to pay the same into court, as might be ordered in this suit, and prayed that said Fitch be declared to hold said one-eighth of said lease claimed by plaintiff as trustee for him, and that he be ordered to convey said undivided eighth to complainant, or that a commissioner be appointed, if necessary, to convey the same; that a receiver be appointed to take charge of and preserve the oil produced from said property, etc. The defendant Fitch filed a plea, in which he relied upon the statute of frauds, and also filed his answer, denying every material allegation in the bill, and also demurred to plaintiff's bill. Depositions were taken and filed by both plaintiff and defendants. The plea filed by defendants was excepted to, and the exception sustained, and the cause heard upon the depositions filed. The plaintiff's bill was dismissed, and from this decree the plaintiff obtained this appeal.

The first assignment of error claims that the court erred in dismissing the plaintiff's bill; the second, that the court erred in not decreeing the one-eighth of the leasehold described in the bill to plaintiff; and, sixth, the court erred because the jugdment was contrary to the law and the evidence. These assignments raise the same questions, and may be considered together. The evidence discloses the fact that there was an agreement between Fitch, Lowther, Thompson, and the plaintiff to jointly procure a lease for oil and gas purposes on a certain ten-acre tract belonging to William Ferrell and said parties were to share equally in the expenses and profits of same leasehold, for which they were to pay forty dollars. It appears that Fitch obtained said lease, and took it in his own name, and, when the time came to assign to each party his respective portion of one-fourth thereof, Fitch deceived and misled plaintiff by his false representations, and thereby induced him to accept one-eighth instead of one-fourth. Now, what was the legal effect of this state of facts? A court of equity surely would not permit the plaintiff to be deprived of the benefit of his contract by false and fraudulent representations. The contract alleged in the bill and shown, I think, by the weight of evidence, raised a trust in favor of the plaintiff.

In *Walraven* v. *Lock*,2 Patt. & H. 547, it is held that: "If one purchases a piece of land, and takes a deed in his own name under a parol agreement with another that it is for his benefit, and that he may, within a reasonable time, by paying a certain sum, become entitled to the land, a trust is raised in favor of the latter, and the agreement may be proved in favor of the latter, and the agreement may be proved by parol evidence. The statute of frauds has no application to such case." In support of this proposition, see also, *Currence* v. *Ward*, 43 W. Va. 368, (23 S. E. 329), where it is held that "neither an express nor constructive trust in lands need be created, declared, or proven in writing in this State, but may be shown by oral evidence." Without entering into a strict analysis of the testimony taken in the cause, the allegations of the bill seem to be sustained by the weight of the testimony. Thompson, one of the original parties to the contract, says that, before the assignment of one-fourth of said lease was made to him and one-eighth to Potts, Fitch told him that he had heard that the Wood well had come in, and was showing for a good one, and he remarked, "We had better make out the assignment at once." This was before dinner, and after dinner they went to witness room to make out the assignments, and, while writing the same, he asked Fitch the amount of Mr. Potts' interest, so that he could specify it in the assignment, and Fitch replied, "One-eighth." Mr. Potts was present, and demurred against one-eighth interest, claiming that one-fourth had been promised him. The substance of Fitch's reply was that he could not give him a greater interest, because Dr. Lowther had taken a half interest, and, if he assigned one-fourth to plaintiff and one-fourth to Thompson, he would have nothing himself. That the plaintiff was to have one-fourth interest in the lease is shown by the testimony of Hugh McEldowney, who says Fitch told him plaintiff took one-fourth interest; and by that of E. J. Thompson, who says it was understood that "we were to receive a quarter." This witness received his fourth, but plaintiff was reduced to one-eighht upon said false representation. Wetzel also testifies that Fitch told him that plaintiff was to have one-fourth of said ten-acre lease. It is plain from the testimony that Fitch had heard that the Wood well No. 1 was a producer, and

conceived the idea of holding three-eighths of said lease, instead of one-fourth, as originally agreed and understood; and, in order to carry out this design, represented to plaintiff that he had already assigned one-half to his father-in-law. But, when we look at Exhibit B filed with plaintiff's bill, it appears that Lowther had assigned him only one-fourth interest, clearly showing that the plaintiff was induced to accept the one-eighth by misrepresentation and fraud. The facts proven establish an agreement between Fitch, Potts, Thompson, and Lowther that Fitch should acquire the lease on said tract, and they were to share equally. This arrangement created an express trust, which, in this State, is not affected by the statute of frauds, but may be shown by oral evidence. See *Currence* v. *Ward*, *supra; Nease* v. *Capehart*, 8 W. Va. 95 (Syl., point 1). In *Murray* v. *Sell*, 23 W. Va. 475., SNYDER, J., delivering the opinion of the Court, said: "When the relation of trustee and cestui que trust is once established, that no subsequent dealings with the trust property by the trustees can relieve it of the trust as between him and his cestui que trust, is too well established to require argument." It appears that at the time the one-eighth was assigned to plaintiff he was ready and willing to pay for one-fourth part, as agreed in the contract, and accepted the one-eighth under protest, although he paid for it, and was prevailed on to accept it under false representations. Such being the case, after reading the testimony in the light of the authorities above quoted, I am of opinion that said Fitch obtained the lease as trustee, and held the same for himself, and the other three, and that he fraudulently withheld from the plaintiff the one-eighth part thereof, and that said plaintiff, upon the payment of the remainder of his proportionate share of the purchase money for said fourth part, is entitled to an assignment thereof, and that the court erred in dismissing the plaintiff's bill. The decree complained of is reversed, and the cause remanded.

ON PETITION FOR REHEARING.

Counsel for W. R. Fitch, in his petition for a rehearing in this case, contends that a trust is not created in the absence of payment of purchase money. This, however, depends on the circumstances of each particular case. In

Nease v. *Capehart*, 8 W. Va. 95, it was held that: "When a debtor has conveyed land to a trustee to secure a debt, and afterwards another person and the debtor agree that the former shall purchase the land, and hold it as a security for the purchase money he pays, and accordingly the debtor acquiesces, and the other purchases the land, the transaction constitutes a trust, which a court of equity will enforce." The case just cited was instituted to enforce a parol contract, and no money was paid to the party who agreed to purchase the property and hold for the trust debtor. The case of, *Heiskel* v. *Powell*, 23 W. Va. 717, relied on by petitioner to show that the agreement must be followed by payment of money in order to create a trust, is very different in its facts from the one under consideration. In this case when the interest of Potts was to be assigned to him, and he was ready and willing to pay for the one-fourth interest, he was met by the false and fraudulent statement made by Fitch that he had already conveyed one-half to Lowther, his father-in-law, and that, if he conveyed to Potts one-fourth, he would have none left for himself, and thereby induced Potts to accept one-eighth. Browne, St. Frauds, § 448a, quotes from *Glass* v. *Hulbert*, 102 Mass. 35, as follows: "The fraud," says Judge Wells in *Glass* v. *Hulbert*, "most commonly treated as taking an agreement out of the statute of frauds is that which consists in setting up the statute against its performance after the other party has been induced to make expenditures, or a change of situation in regard to the subject-matter of the agreement, or upon the supposition that it was to be carried into execution, and the assumption of rights thereby to be acquired; so that the refusal to complete the execution of the agreement is not merely a denial of rights which it was intended to confer, but the infliction of an unjust and unconscientious injury and loss. In such cases the party is held, by force of his acts or silent acquiescence which have misled the other to his harm, to be estopped from setting up the statute of frauds." The fraudulent representation of Fitch in this case induced Potts to change his situation in regard to the subject-matter by accepting one-eighth instead of one-fourth, and for that reason he is estopped from setting up the statute of frauds. Nothing was said about the original agreement being made as to the

seventy-four-acre tract when one-fourth was assigned to Thompson, one-fourth to Lowther, and one-eighth to Potts. They each were assigned portions of the ten-acre tract, and the fact that the Wood well was a producer was carefully concealed from Potts. In the case of *Campbell* v. *Fetterman*, 20 W. Va. 398, it is held that collateral cir cumstances attending the agreement, and mistake or fraud in the procurement or execution of the agreement, may be proved by parol evidence. See, also, 1 Pom. Eq. Jur. § 431, note 3. Herm. Estop. p. 1072, § 946, says: Estoppels *in pais* are well founded when confined to the legitimate purpose of preventing one man from being injured by the acts or misrepresentations of another." See, also Bigelow, Estop. 712, where it is said, "It is everywhere conceded, indeed, that the title to land can be affected by estoppel *in pais* arising from fraud." It is so apparent that the false representations made by Fitch were induced by the fact that he had heard that the Wood well was a producer, and for that reason he wanted to retain as much of this lease as possible, and made these fraudulent representations, that his reliance upon the statute of frauds cannot avail him. Story, in his Equity Pleadings (section 767), thus states the law: "Whatever may be the doubts in some cases of trust, it seems clear that, where the bill sets up a parol trust, the nonperformance of which would be a fraud upon the plaintiff, or where the parol trust is a secret trust, alleging to be in fraud of the public policy of the country, a pure plea of the statue will not prevail; for the statute will never be allowed to cover fraud." See, also, *Haig* v. *Kaye*, 7 Ch. App. 469, where it is held that "the statute of frauds cannot be used by a defendant to cover a fraudulent act." It is true that in the case of *Nash* v. *Jones*, 41 W. Va. 769, (24 S. E. 592), in one point of the syllabus it was held that, "where a man merely employs an agent to buy an estate, who buys it for himself, and denies the trust, and no part of the purchase money is paid by the principal, and there is no written agreement, he cannot compel the agent to convey the estate to him, as that would be in violation of the statute of frauds;" but in that case the facts were materially different from the case at bar, for Potts did not employ Fitch as his agent to buy an estate, but Potts, Lowther, and Thompson agreed to go

in with Fitch, and purchase this lease for forty dollars, each to take one-fourth, and for convenience the lease was assigned to Fitch alone, and, no doubt, Fitch intended in good faith to assign a fourth of each of the other three, and would have done so had not the Wood well near by come in a producer. Then he conceived the idea of defrauding Potts out of one-half of his interest by falsely claiming that he had conveyed one-half to Lowther, his father-in-law, and would have none left for himself if he assigned one-fourth to Potts. The statute of frauds will not avail Fitch to cover this fraudulent act, or protect him from its effects.

For these reasons the rehearing should be refused.

Reversed.

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CHARLESTON.

CHILDERS *et al.* v. NEELY.

Submitted June 17, 1899—Decided November 28, 1899.

1. MINING PARTNERSHIP—*Oil Lease.*
   Where tenants in common or joint tenants of an oil lease or mine unite and co-operate in working it, they constitute a mining partnership. (p. 72).

2. MINING PARTNERSHIP—*Control.*
   When members of a mining partnership cannot agree in management, those having a majority interest control its management in all things necessary and proper for its operation. (p. 73).

3. MINING PARTNERSHIP—*Dissolution.*
   A sale of his interest by a member of a mining partnership to another member or a stranger does not dissolve the partnership, as in ordinary partnerships. (p. 74).

4. MINING PARTNERSHIP—*Negligence of Partner.*
   If loss come to the firm by the culpable negligence or breach of duty or wrongful conduct, or diversion of the

social property from the firm's business to other business by one member, he is personally accountable therefor in an accounting between the members. (p. 75).

5. MINING PARTNERSHIP—*Lien for Advancement.*
Partners have a lien on a social property for advances or balance due them, after debts; but if they have divided the property or product of the business, giving each his share in severalty, and separating it from the balance, no such lien exists on the property or product so actually divided. Such is the case with "division orders" in oil mining. (p. 75).

6. MINING PARTNERSHIP—*Dissolution.*
If a bill is filed by a member of a co-partnership for dissolution and account, and cause is shown for dissolution, there should be a decree of dissolution and full account, not one allowing the partnership to continue its business, and making only a partial account, and decreeing on its basis in favor of one against another member for a balance on such partial account, leaving assets untouched by the account. (p. 78).

7. MINING PARTNERSHIP—*Dissolation Receiver.*
When cause is shown for dissolution of a partnership, and the members are discordant and at ill will, and the partnership hopeless of prosperity, it should be dissolved, and a receiver and manager appointed, instead of leaving its assets and business wholly in the possession and control of one member, excluding the other. (p. 78.)

8. MINING PARTNERSHIP—*Equitable Relief.*
Equity, as a general rule, does not entertain a bill for account between partners unless a dissolution and winding up are asked, and cause therefor shown. Then there should be dissolution and full final account. (p. 78).

Appeal from circuit court, Tyler County.

Bill by J. M. Childers and another against S. H. Neely. Judgment for plaintiffs, and defendant appeals.

Reversed.

F. L. BLACKMARR, for appellant.

ROBERT MCELDOWNEY and G. M. MCCOY, for appellees.

BRANNON, JUDGE:

Childers and Ramey filed a bill in equity in the circuit court of Tyler against Neely, praying that a partnership between them be dissolved, an account taken "of all its accounts, dealings, and transactions whatever," and that a manager be appointed to take charge of the property. The business was oil production. Neely admitted the joint

enterprise, but denied the partnership; and he joined in request for account, and did not resist a dissolution, if a partnership. The decrees made a partial account, decreed its balance against Neely, and denied him further participation, in the partnership and he appealed.

This case raises an interesting and important subject in this mining State; that is, whether, and when, joint tenants or tenants in common, jointly operating for oil, are partners, or merely co-owners. The bill asserts a partnership, while Neely denies it, asserting that it is a case, not of partnership, but co-ownership.

In two leases of town lots for oil and gas purposes, Childers owned one-fourth interest; Ramey, a three-eighth interest; Neely, a three-eighth interest. They were so far joint tenants. They agreed to develope the lots for oil, but made no written articles of partnership, in fact, no oral express formation of a partnership. They simply, by an indefinite understanding, agreed to develop their common property, each giving his skill, paying his share of outlay proportionate to his ownership, and getting his share of the product proportioned to such ownership. I use the word "product," instead of "profits," because there was no contract explicit in this point to distinguish product from profit. "Partnership must be distinguished from joint management of property owned in common. Where two partners own a chattel, and make a profit by the use of it, they are not partners without some special agreement which makes them so." T. Pars. Partn. § 76. Two heirs or other co-owners of a farm, jointly farming it for profit, are not partners. There is a peculiar partnership, called a "mining partnership," partaking partly of the nature of an ordinary trading or general partnership, on the one hand, and partly of a tenancy in common, on the other. It is an important question to those engaged in the oil and other mining business whether each one is jointly and severally liable for all the doings of every or any other of the associates in the venture, as in ordinary trading partnerships. What is a mining partnership? 15 Am. & Eng. Enc. Law, p. 609, says: "When tenants in common of a mine unite and co-operate in working it, they constitute a mining partnership." Many authorities there cited thus define it. See the California case of *Skillman* v.

Lachman, 83 Am. Dec. 96, and note discussing it fully; *Lamar's Ex'r* v. *Hale*, 79 Va. 147. Mere co-working makes them partners, without special contract. Barring. & A. Mines & M. Courts of equity take jurisdiction of them as if general partnerships. 2 Colly, Partn. chapter 35. Of course, owners of mines, oil leases or farms can by agreement make an ordinary partnership therein; but "where tenants in common of mines or oil leases or lands actually engage in working the same, and share, according to the interest of each, the profits and loss, the partnership relation subsists between them, though there is no express agreement between them to be partners or to share profits and loss." *Duryea* v. *Burt*, 28 Cal. 569. The presumption in such case would be that of a mining partnership, rather than an ordinary one, in absence of an express agreement forming an ordinary general partnership. Perhaps the case of *Bank* v. *Osborne*, 159 Pa. St. 10, 28 Atl. 163, and other cases in that state cited in Bryan, Petroleum & Natural Gas, 283, would justify the inference that the parties operated as tenants in common; but the current of authority elsewhere recognizes the inference of mining partnerships. That state does not recognize such a partnership. Justice Field said in *Kahn* v. *Smelting Co.*, 102 U. S. 645, 26 L. Ed. 266; "Mining partnerships, as distinct associations, with different rights and liabilities attaching to their members from those attaching to members of ordinary partnerships, exist in all mining communties. Indeed, without them successful mining would be attended with difficulties and embarrassments much greater that at present." One leading distinction between the mining partnership and the general one is that the general one has, as a material element of its membership, *a delectus personæ* (choice of person), while the other has not. Those forming an ordinary partnership select the persons to form it, always from fitness, worthiness of personal confidence; but we know such is not always or often the case in oil ventures. It is because of this *delectus personæ* that the law gives such wide authority of one member to bind another by contracts, by notes, and otherwise. One is the chosen agent of the other. Hence, when one member dies or is bankrupt, or sells his interest to a stranger, even to an associate, the partnership is closed,

one chosen member is gone, the union broken, because he may have been the chief dependence for success, and the newcomer may be an unacceptable person, who would entail failure upon the firm. In the mining partnership, those occurences make no dissolution, but the others go on; and, in case a stranger has bought the interest of a member, the stranger takes the place of him who sold his interest, and cannot be excluded. If death, insolvency, or sale were to close up vast mining enterprises, in which many persons and large interests participate, it would entail disastrous consequences. From the absence of this *delectus personæ* in mining companies flows another result, distinguishing them from the common partnership, and that is a more limited authority in the individual member to bind the others to pecuniary liability. He cannot borrow money or execute notes or accept bills of exchange binding the partnership or its members, unless it is shown that he had authority; nor can a general superintendent or manager. They can only bind the partnership for such things as are necessary in the transaction of the particular business, and are usual in such business. *Charles* v. *Eshleman*, 5 Colo. 107; *Skillman* v. *Lachman*, 83 Am. Dec. 96, and note; *McConnell* v. *Denver*, 35 Cal. 365; *Jones* v. *Clark*, 42 Cal. 181; *Manville* v. *Parks*, 7 Colo. 128, 2 Pac. 212; *Congdon* v. *Olds*, 18 Mont. 487, 46 Pac. 261; *Judge* v. *Braswell*, 13 Bush. 67; *Waldron* v. *Hughes*, 44 W. Va. 126, (29 S. E. 505). In fact, it is a rule that a nontrading partnership, as distinguished from a trading commercial firm, does not confer the same authority by implication on its members to bind the firm; as, e. g. a partnership to run a theatre or other single enterprise only. *Pease* v. *Cole*, 53 Conn. 53, 22 Atl. 681; *Deardorf's Adm'r* v. *Thacher*, 78 Mo. 128; Smith, Merc. Law, 82; T. Par. Partn. § 85; *Pooley* v. *Whitmere*, 27 Am. Rep. 733. A mining partnership is a nontrading partnership, and its members are limited to expenditures necessary and usual in the particular business. Bates, Partn. § 329. Members of a mining partnership, holding the major portion of property, have power to do what may be necessary and proper for carrying on the business, and control the work, in case all cannot agree, provided the exercise of such power is necessary

and proper for carrying on the enterprise for the benefit of all concerned. *Dougherty* v. *Creary*, 89 Am. Dec. 116.

These principles settle much of this case. The demurrer was properly overruled, because there was a partnership, and equity only has jurisdiction to settle partnership accounts. 5 Am. & Eng. Dec. Eq. 74; 17 Am. & Eng. Enc. Law, 1273.

Neely excepted to the commissioner's report of settlement because of the allowance to Ramey of an expenditure advanced by Ramey of three hundred and sixty-nine dollars and seventy-five cents, as excessive, and because for repairs on two boilers without his consent. If the parties were mere joint tenants, consent would be necessary. *Ward* v. *Ward's Heirs*, 40 W. Va. 611, (21 S. E. 746), 29 L. R. A. 449. But, being partners, as above stated, a partner has power to order necessary repairs. Besides, Ramey owned a majority interest. The boilers were burnt badly, and it seems that this outlay, though large, is proven, and was necessary and usual in such a business, and, if unattended with other circumstances, would be clearly allowable under principles above stated. The commissioner reports that the injury to the boilers came from neglect of the pumpers; but much evidence tends to show that Ramey, without consent of Neely, removed the boilers off the ground owned by the firm, upon a lease of Ramey and Childers, in which Neely had no interest, and used them with another boiler in boring and operating wells thereon in connection with these wells of the firm, in Neely's absence, and put too much work upon them, with inadequate supply of water, which, likely, by heavy firing, caused the burning of the boilers. If this is so, how can Ramey expect pay for this outlay? Would so serious an injury have occurred to the boilers had this improper use of them not been made? We cannot say so with certainty, but it seems not likely. Ramey has no just claim, to be repaid expenditure for repairs caused by himself,—the diversion of the firm property to his own work, from the work of the firm. Losses from neglect of duty or bad faith of a partner, or breach of duty, or breach of a partnership agreement, or improper diversion of its property to purposes foreign to its business, will be charged to him, in accounting. 17 Am. & Eng. Enc. Law, 1217; 1 Coolly.

Partn. § 312; Story, Partn. § 169; T. Pars. Partn. § 151. Ramey does not deny such use.

The exception for the two hundred and thirty-nine dollars and seventy-five cents allowed Ramey for three-eighths of expense seems not well taken, and was properly overruled. The commissioner reports that Neely should be allowed nothing for such use of the boilers for business of Childers and Ramey outside the legitimate firm business, yet allows him one hundred dollars therefor. We are unable to say that such sum is not correct in amount, and will have to sustain the commissioner as to it.

Neely excepted because the commissioner reported that he was not entitled to any allowance on the claim made by Neely, that by reason of the use of the firm's boilers in boring and operating wells of Childers and Ramey on adjoining leases owned by them, in which Neely was not interested, the two wells of the firm, which had been bored before the others were, and were paying wells, were often shut down and unproductive, while those other wells were going on, and that by reason of want of water and steam, and the inadequacy of the engines to run all the wells, five or six in number, the production of the firm's wells was diminished. The commissioner says that Neely suffered no appreciable injury thereby. If injured at all, it was appreciable, and to be estimated. Ramey states, in short, that Neely was not entitled to a cent on this score. Neely's evidence is distinct that he was there numerous times, and found these two wells still. He swears to a large loss from this cause. He furnishes considerable evidence to sustain him in some loss from this score, and it seems that equity should make some compensation for it. There is evidence that Ramey, when asked why the wells were shut down, said that he had a larger interest in the other wells. Ramey (having bought out Childers' interest, and Neely being absent almost all the time of operation) had sole charge. The commissioner bases his opinion of no injury to Neely from pipeline reports, which are before us, but it does seem from the evidence that the firm business was neglected, and loss to it accrued therefrom to an appreciable extent, for which some compensation should be made. It is difficult to say what should be allowed on this account, it being a thing of only approximate estimate; and still it

seems an allowance should be made, as Ramey is claiming for outlay, and himself controlled the business.

When this suit was brought, Childers and Ramey obtained in it an injunction enjoining the pipeline companies transporting the firm's oil from paving Neely for his share of the oil to which he was entitled under his division orders, and enjoining Neely from any further participation in the partnership, and from selling his share of the oil; thus taking from him the wells and their proceeds, and leaving Ramey in sole charge of them. Neely complains that the court refused to dissolve this injunction. His counsel says there was no right to it, as the bill charged no insolvency. The bill, however, did charge that Neely had failed to contribute his part of the expense of the business, and that Ramey and Childers had made large outlays therefor, and that Neely had refused to make settlement, and was largely indebted to his associates from the transactions of the partnership. This justifies the injunction, if the oil of Neely were social assets, as partners, in advancing for expenditures for the partnership, have a lien on partnership property for advances. *Skillman* v. *Lachman*, 83 Am. Dec. 109; *Duryea* v. *Burt*, 28 Cal. 570; T. Pars. Partn. § 402, note. But this lien is only on partnership property while distinctly such; for it is the law that if there is a separation or division of the property, or part of it, there is no lien. If two partners consign goods for sale, and direct the consingee to carry the proceeds to the account of each, and it is done, neither partner has any lien on the share of the other in those proceeds, though it would have been otherwise if they had remained part of the common property. 2 Lindl. Partn. § 683; 1 Colly. Partn. § 108, note. Now, these partners agreed to have division orders when they began business (that is, the pipe lines to give each certificate of his share of the oil committed to them, which was a product of the wells); and this effected a separation of that product, making each one's share his several property, and severing it from the social property, if it was such at any moment. There being no lien, there was no justification for the injunction. It perhaps disabled Neely from paying as the bill demanded of him.

There is another error in the proceeding. The bill de-

manded a dissolution. It showed abundant cause, and the evidence shows abundant cause, of dissolution. The bill charges that the plaintiffs and Neely made a settlement to a certain date, but that they had been unable to get Neely to make a settlement since then; that he was violent and abusive, had threatened them with violence, and declared he would have nothing more to do with them; that he would not contribute to expenses; that bills remained un paid; and that because of the unsatisfactory condition of the business, and the "disagreements, dissentions, and disaffections between the partners, the property and business were suffering." The evidence shows these disagreements and dissensions. Thus, it was plain that the business was hopeless of success and prosperity, and the interests of all parties demanded absolute dissolution at the hands of the law. Reconciliation, harmony, and success were utterly beyond hope. 17 Am. & Eng. Enc. Law, 1104. Therefore the court should have decreed dissolution absolute, and directed an account of the partnership, and wound it up. But it decreed no dissolution, but, on the contrary, suffered the partnership still to subsist, and, indeed, go on in the sole hands and management of Ramey, excluding Neely therefrom, and decreed that the settlement by the commissioner should only apply to its date, leaving it open to future account. The decree perpetuated the injunction, forever prohibiting Neely from participation in the business, and provided that when he should pay four hundred and eighty-seven dollars and fifteen cents found due from him, and costs, the injunction should cease. That excellent, very late work, containing the leading late decisions in equity in America and England, the American and English Decisions in Equity, with elaborate notes collecting decisions (volume 5, p. 52), lays down the rule that equity can only entertain jurisdiction for an account when it can make a final decree in the suit; citing *Randolph's Adm'x* v. *Kinney*, 3 Rand. 394. That work (page 109) says., "As a general rule, a bill for accounting between partners which does not also seek a dissolution of the partnership will not be maintained;" citing cases,—among them, *Colville* v. *Gilman*, 13 W. Va. 314, in which Judge Green fully sustains this position. T. Pars. Partn. § 206; 2 Lindl. Partn. 948. If there ever were cases which, by

bill and proof, called for dissolution, and final account, not partial, this is one. And, besides the showing of bill and proof, a petition for rehearings alleged that Ramey had sold the boilers. The evidence so shows. This would charge Ramey to credit of Neely. There was partnership property in Ramey's hands. There could only one adequate relief be given,—dissolution, sale of the property entire, and full account. But no provisions was made for dissolution, sale, or full account,—only a partial settlement and decree against Neely for the sum found by it. The bill alleged that the property could not be divided in kind. If the injunction applied to property belonging to the firm, on which a lien rested for the other partners, it would be proper to continue it until final account and decree. *Robrecht* v. *Robrecht* 46 W.Va. 738, (34 S. E. 801). But Neely's share of the oil was his separate property. And I do not see why he should, without cause, be excluded from participation, letting Ramey have sole control. A receiver, impartial between them, was proper, under the circumstances. "If no dissolution is sought, a receiver and manager will not be appointed; but, with a view to a dissolution or winding up, a receiver and manager will be appointed, if there are any such grounds for appointment as are proper in other cases, or if the partners cannot agree to working the mines until sold." Colly. Partn. § 381. Therefore we dissolve the injunction, reverse the decree, overrule the demurrer to the bill, and remand for further proceedings as herein indicated, and further according to principles governing courts of equity in such cases.

Reversed.

CHARLESTON.

SHEPHERD v. SNODGRASS *et al.*

Submitted Sept. 12, 1899—Decided Nov. 28, 1899.

1. DEPOSITION—*Signature.*

Though regular to have a witness to sign a deposition, yet its omission will not suppress the deposition. (p. 81).

2. DEPOSITION—*Certification.*

Though regular in depositions to state in the caption or closing certificate the names of the witnesses, yet its omission will not suppress the depositions, if it is certified in effect, in caption or certificate, that the depositions were duly taken, sworn to, etc., so as to identify them. (p. 81).

3. DEPOSITION—*Reading to Witness.*

Depositions taken in shorthand by the stenographer, and afterwards written out in longhand by the stenographer, but not read to or by the witnesses after being written in longhand, if objected to, cannot be read, though the stenographer certifies that they were fully and truly written out by him in longhand in the words spoken by the witnesses. (p. 81).

Appeal from circuit court, Wetzel County.

Bill by George W. Shepherd, committee of Martha L. Noland, and said Noland, against R. E. L. Snodgrass and others. Decree for defendants, and plaintiff Shepherd appeals.

Affirmed.

ROBERT MCELDOWNEY and S. BRUCE HALL, for appellant.

C. A. SNODGRASS, and W. A. SNODGRASS, for appellees.

BRANNON, JUDGE.

This was a chancery suit in the circuit court of Wetzel County by George W. Shepherd, committee of Martha L. Noland, and said Noland, against R. E. L. Snodgrass and others, to annnul several deeds made bv Martha L. Noland, on the ground of her mental incompetency to make them, resulting in a decree dismissing the bill, from which the guardian has appealed.

The first question raised is want of jurisdiction, as, though Martha Noland was a co-plaintiff, she is not an appellant. It seems to me that the committee can alone appeal. Likely, though a committee has no legal title, he could sue alone to annul a deed of his *non compos*, under Code 1891, chapter 58, section 37, giving him the right to the possession of the estate of the *non compos* and to sue in respect to it; and more clearly still, where the *non compos* is a co-plaintiff, the committee may alone appeal by reason of his representative interest. 2 Enc. Pl. & Prac. 158, 161.

A question arises when we come to consider the appeal on its merits. The appellant asks us to reverse the de-

cree because contrary to the evidence. When we take up the plaintiff's evidence, we find the depositions were excepted to by the defense; but the exceptions were overruled, and the defense cross assigns this as error. We must therefore determine whether we can read them to overthrow the decree. One ground of exception is that the positions are not signed by the witnesses. The notary certifies that the witnesses did give and swear to the depositions, and their signatures are not indispensable, though they ought to be there. 1. Bart. Ch. Prac. 741.

Another objection is that the captions or certificates to depositions do not insert the names of the witnesses. Why this departure from form and usage I do not see; but as the names of the witnesses appear at the head of each deposition, and the notary certifies that "the foregoing depositions of witnesses" were taken, etc., I conclude this will do.

The next exception is based on the fact that the depositions were taken in shorthand, and afterwards written out in longhand, and never seen by or read over to the witnesses in longhand, or signed by them. What is the effect of this mode of taking depositions?

They are not good. In *Moller* v, *U. S.* 6 C. C. A. 459, 57 Fed. 490, 13 U. S. App. 472, it was held by the circuit appellate court that depositions taken down in questions and answers by a stenographer, and not reduced to writing in the presence of the witness, nor read over to or by him, are not properly taken, and not admissible against the objection of either party. In *Re Cary* (D. C.) 9 Fed. 754, it was held that depositions taken by a stenographer before a register, and afterwards reduced to longhand, will be suppressed, if not read to and signed by the witness, according to general order ten, after they are written out. That order says, "that the depositions shall be taken down in writing by or under the direction of the witness, and signed by him in the presence of the register." But this I understand to be only general practice. In *Zehner* v. *Navigation Co.*, 41 Al. 464, 187 Pa. S. 487, it was held that "a deposition taken by a stenographer in shorthand, after being written out in longhand, must be scrutinized, assented to, and signed by the witness." The opinion says:

"It ought to be obvious to any one that depositions taken by a stenographer in shorthand must be fully written out in longhand, read by or to the witness, and assented to and signed by him." These requirements, or their full equivalents, are essential, and cannot be dispensed with. The so-called "depositions" offered in this case were wanting in nearly all of these essential particulars. Such a practice is exceedingly vicious and dangerous, and cannot be too severely condemned. It is true the "depositions," so called, were written out in longhand, but until they were scrutinized and assented to by the witnesses there could be no assurance that they were correct. I do not fail to see that in the first two cases the officer taking the depositions and the stenographers were different persons, whereas in this case they are the same; but that does not change the principle. The stenographer may mistake. If he wished to falsify, it is easily done, if he takes shorthand from the witness, and then, in his absence, write it in longhand. When written in longhand, the witness sees the deposition, reads it, amends it. The counsel of both sides see it, and know, when closed, just what it contains. But they know no more of shorthand than of Chinese or Sanscrit characters. The deposition has not received the final approval of the witness. He is entitled to a scrutiny of it. Both litignats are deeply interested that he shall have it. Any other process would be dangerous, in opening wide the door of mistake and fraud. I have not the Pennsylvania case before me, only extracts in a brief, but its general principles are correct, whether the notary and stenographer were the same or not. Our statute (Code, p. 1062) applies only to stenographers appointed by courts. No statute authorizes a stenographer to take a deposition in shorthand, and then merely longhand and certify it, as is the case in some states under statute. A question of some trouble would arise if the evidence, including those depositions, would reverse the decree, but not without them, and that question is whether we could read the defective depositions to reverse the decree. Ought we reject them and affirm, or through them reverse and remand, with leave to retake them? My own opinion is that such depositions cannot be read to reverse the decree. The party took the risk of submitting the case on them, and must be held to

know the law, and anticipate ultimate decisions as to the depositions. *Davis* v. *Brown*, 46 W. Va. 716, (34 S. E. 839). But it is not necessary to decide this point. If with those depoistions the decree cannot be reversed, it would be useless to retake them. I have finally concluded that such is the case. The object of this suit is to annul a deed on account of mental incompetency of its grantor. The law presumes competency, and it takes clear evidence to overthrow the presumption. *Delaplain* v. *Grubb*, 44 W. Va. 612, (30 S. E. 201.) There is a volume of conflicting evidence and differing opinions as to the capacity of Martha Noland, expert and nonexpert. Two physicians, who tested her capacity just after the execution of the deed, definitely assert her capacity. Other physicians, who knew her well, do likewise. The notary taking the acknowledgment, and two other witnesses present when it was taken, assert her capacity, and that is the crucial time of test, and such evidence is very forcible. *Delaplain* v. *Grubb*, *supra*.

And it is to be remarked, as weakening the plaintiff's case, that the evidence to attack the deed is largely mere opinion of nonexpert witnesses, which has been held to be nearly worthless, unless stating facts warranting such opinion. *Kerr* v. *Lunsford*, 31 W. Va. 659, (8 S. E. 493), 2 L. R. A. 668. These witnesses do not give facts very strong to sustain their opinion. On this mass of evidence different judges might come to different conclusions. At best, it is only matter of opinion. I have myself been indecisive in mind as to it. There is the decision of the circuit court, and we cannot reverse it, unless we can find its decision clearly wrong. When I reflect upon the legal principles above stated, and the conflict of evidence, I am quite decided that we must leave the cases as decided by the circuit court. Had that court decided otherwise, we would not reverse, but here are both the decision and the strong presumption of sanity to forbid reversal. Decree affirmed.

Affirmed.

CHARLESTON.

ECLIPSE OIL CO. *v.* SOUTH PENN OIL CO.

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Submitted Sept. 13, 1899—Decided Nov. 28, 1899.

I. ESTATE AT WILL—*Termination.*

"If one party may terminate an estate at his will, so may the other. The right to terminate is mutual." *Cowan* v. *Iron Co.*, 3 S. E. 120, 83 Va. 347. (p. 87).

2. OIL LEASE—*Right to Surrender.*

An executory gas and oil lease, which provides for its surrender at any time, without payment of rent or fulfillment of any of its covenants on the part of the lessee, creates a mere right of entry at will, which may be terminated by the lessor at any time before it is executed by the lessee. (p. 88).

3. OIL LEASE—*Effect of New Lease.*

The execution of a new lease to other lessees, and possession thereunder, render such prior executory lease invalid. (p. 88).

4. OIL LEASE—*Equity.*

An executory lease that is unfair, unjust, or unreasonable will not be enforced in equity. (p. 89).

5. CONTRACT—*Mutuality.*

If one party to a contract is not bound to do the act which forms the consideration for the promise, undertaking, or agreement of the other, the contract is void for want of mutuality. (p. 102.)

Appeal from circuit court, Wetzel County.

Action by the Eclipse Oil Company against the South Penn Oil Company. Decree for defendant. Plaintiff appeals.

Affirmed.

HUBBARD & HUBBARD, J. R. SUMMERVILLE and ROBERT MCELDOWNEY, for appellant.

U. N. ARNETT, A. B. FLEMING and M. F. ELLIOTT, for appellee.

DENT, PRESIDENT:

This is a controversy between the Eclipse Oil Company, appellant, and the South Penn Oil Company and others, from the circuit court of Wetzel County, over a lease in the following words, to wit: "Agreement made and entered into this 11th day of May, A. D. 1897, by and between Henry Garner, of the county of Wetzel and state of West Virginia, of the first part, and H. J. and J. C. Stolze, parties of the second part, witnesseth, that the said party of the first part, for and in consideration of the covenants and agreements hereinafter mentioned, does covenant and agree to lease, and by these presents has leased and granted, the exclusive right unto the parties of the second part, their heirs or asisgns, for the purpose of operating and drilling for petroleum and gas, to lay pipe lines, erect necessary buildings, re-lease, and subdivide, all of that certain tract of land situate in Proctor district, Wetzel County, and state of West Virginia, and bounded and described as follows, to wit: Bounded on the north by lands of C. Parsons' heirs, on the east by the lands of Burton, on the south by the lands of Isaac and William Smith, on the west by lands of James Newman; containing 102 acres, be the same more or less. The parties of the second part, their heirs or assigns, to have and to hold the said premises for and during the term of 3 years from the date thereof, and so long thereafter as oil or gas can be produced in paying quantities. The parties of the second part, heirs or assigns, agree to give to the first party ⅛ part of all petroleum obtained from the said premises, as produced in a crude state; the said ⅛ part of the petroleum to be set apart, in the pipe line running said petroleum, to the credit and for the benefit of the said party of the first part. The said party of the first part is to fully use and enjoy the said premises for the purpose of tillage, except such part as shall be necessary for said mining purposes, and the right of way over and across the said premises to the place or places of mining or operating. The said parties of the second part are further to have the privilege of using sufficient gas and water from the premises herein leased to run the necessary engines, with the right to secure any machinery, fixtures and buildings placed on said premises by the said parties of the second part or those

acting under them, and are not to put down any well for oil on the lands hereby leased, within 50 rods of the buildings now on said premises, without the consent of the said party of the first part. Damages done to growing crops shall be paid by second party. It is agreed that, if gas is found in paying quantities, the consideration in full to the party of the first part for gas shall be $200.00 (two hundred dollars) per annum for the gas from each well, when utilized off the premises; gas free of charge for household uses to first party. The parties of the second part agree to drill one test well on the above described premises within six months from the execution of this lease, or, in lieu thereof, thereafter pay to the said party of the first part one dollar per acre per annum until such well is completed; and if said test well is not completed within six months from the above date, or rentals paid thereon, this lease is null and void, and not further binding on either party. And it is furher agreed that the second parties, their heirs or assigns, shall have the right at any time to surrender up this lease, and be released from all moneys due and conditions unfulfilled; then and from that time this lease and agreement shall be null and void, and no longer binding on either party, and the payments which have been made held by the party of the first part as the full stipulated damages for nonfulfillment of the foregoing contract; that all conditions between the parties hereto shall extend to their heirs, executors, and assigns. In witness whereof, we, the said parties of the first and second parts, have hereunto set our hands and seals. Henry Garner. [Seal.] H. & J. C. Stolze. [Seal.] Witness: Sam J. Beck." This lease was assigned to the Eclipse Oil Company. On the 18th day of June, 1898, the lessor again leased this property to J. A. Phillips, who assigned to the South Penn Oil Company. The latter company began developements, when the Eclipse Oil Company obtained an injunction, claiming that its lease was still valid, although nothing was done thereunder except the payment by it of the annual rental provided for on the 10th day by November, 1898, and alleged acceptance thereof by the lessor. The injunction was dissolved on motion, and plaintiff appeals.

The effect of the last clause of the controverted lease ap-

years to have been overlooked by counsel. It is in these words: "And it is further agreed that the second parties, their heirs or assigns, shall have the right at any time to surrender up this lease, and be released from all moneys due and consideration unfulfilled; then and from that time this lease and agreement shall be null and void, and no longer binding on either party," etc. This clause apparently destroys this lease, or renders it invalid, at least until some consideration has passed from the lessee to the lessor. Lessee's counsel claim that he was not bound to do anything or pay anything until eighteen months from the date of the lease, and in the meantime he has the right to surrender it, and thereby be released entirely from any obligation whatever. This renders it, to this extent, *nudum pactum*, by which the lessor is not bound any more than the lessee; and, until something is done in consummation thereof, either party may terminate it. "If one party may terminate an estate at his will, so may the other. Right to terminate is mutual." *Cowan* v. *Iron Co.*, 83 Va. 547, 3 S E. 120; *Petroleum Co.* v. *Coal, Coke & Mfg. Co.*, 89 Tenn. 381; 18 S. W. 65; *Knight* v. *Iron Co.*, 47 Ind. 105; *Pidgeon* v. *Richards*, 4 Ind. 374; 2 Bl. Comm. 135. The lessee was out nothing, at no expense, and running no risk, and yet he makes the conditions of his contract such that the lessor cannot tell for eighteen months whether the contract is to be binding on the lessee or not. In the meantime, he receives nothing for his delay. As Judge Brannon says in the case of *Roberts* v. *Bettman*, (W. Va.) 30 S. E. 95, "The covenant to pay is brought to birth by the lease, only to die at the hands of its mother,"—a case of fetal strangulation which kills the mother. The lessor had the right to terminate this *nudum pactum* at any time, which he effectually did by making a new lease, and giving possession of the premises to another. 12 Am. & Eng. Enc. Law, 757; *Kelly* v. *Waite*, 12 Metc. (Mass.) 300; 2 Bl. Comm. 146; *Guffy* v. *Hukill*, 34 W. Va. 49, (11 S. E. 754), 8 L. R. A. 759. Nor can declarations or conduct on his part affect the rights of his new lessee. The lessor's conduct in receiving the rent and recognizing the prior leases after he had parted with the estate would be of very little weight, if admissible as evidence, for he "was an old, fee-

ble man, easily influenced." It must be presumed that the lessor, in executing the last lease, intended to do and did what he had the legal right to do. The lessees, having the mere right of entry, were not bound to do so, and could escape the payment of any consideration at any time, at their will, by surrender of the lease. They could hold on for years, or until their lessor pressed for his rent, and then surrender his own lease in satisfaction thereof. This is not like the lease in the case of *Roberts* v. *Bettman*, cited above, and in which the majority of this court held that the lessor was entitled to demand rent until the lease was surrendered. That lease provided that at any time the lessee might surrender the lease, and "thereafter be discharged," while this lease provides that the lessee "shall have the right at any time to surrender up his lease, and be released from all moneys due and conditions unfulfilled." It is a complete release, as referred to in Judge English's dissenting opinion in the case last cited. Nor was the right of the lessor to terminate the lease raised in that case. But both parties having allowed the lease to remain in being for a certain length of time, without any effort on the part of either party to terminate it, the court held that the lessee, having retained the lease and enjoyed its benefits, could not take advantage of his own wrong to escape the payment of the accrued rents. It was admitted that he could surrender at any time, and thereafter be discharged, while under the present lease the lessees could surrender, and were released. There was nothing to bind them to pay rent or explore. These matters were as completely at their will as though they had signed no lease. The lessor, by execution of the junior lease, passed all his right to his lessee; and, if there was anything necessary to be done to terminate the senior lease, the lessee had the right to do it. It might be possible to show in some way that the junior lease was not intended to take away the right of entry of the senior lessees. There would have to be proper allegations to this end in the bill. It contains none, and the presumption is that there are none. The plaintiff rests its case entirely on the validity of its leases. The defendant's lease renders them invalid. The plaintiff was at no expense or loss before it had full notice of the termination

of its leases. Such termination was neither inequitable or unconscionable, but rid the lessor of a dubious, speculative contract, liable to be defeated at any moment, to his loss and injury, by his lessees. The plaintiff afterwards paid the rent at its own risk, and, with wide-open eyes, assumed the consequences, thereof. This determination renders it unnecessary, to construe the thereafter clause so eloquently and earnestly dwelt upon by the learned counsel on both sides of this litigation, and the questions raised will be left open for future consideration in a proper case.

There is another ground for which this lease should not be enforced by a court of equity, and that is its unfairness. The lessor executed this lease with the expectation of a prompt development of his land. The lessees deceived him by the covenant to sink a well in six months, and then, under the pretense of fixing a penalty, in the shape of rental, for failure to complete the well in the time prescribed, skillfully turned it into a speculative lease, for rental merely, which, according to their claim, they had eighteen months, and so much longer, as they could postpone the same, to decide to pay or not. This evidences a plain intention on their part not to explore for oil or gas, and the covenants in relation thereto were simply a blind to deceive the confiding lessor. It is decidedly a one-sided lease, and, if the lessor had remained quiet, they could have held it for an indefinite period without either exploring for gas or oil or paying any rent. That only those contracts which are fair, just, and reasonable will be specifically enforced is an unquestionable doctrine of equity, and any trace of unfairness will render specific performance impossible. 22 Am. & Eng. Enc. Law, 1022; *Vogel* v. *Pekoc*, 157 Ill. 339, 42 N. E. 386, 30 L. R. A. 491; *Weaver* v, *Weaver*, 109 Ill. 225; Chit. Cont. 155.; Bish. Cont. 32; 1 Whart. Cont. 5; *Marble Co.* v. *Ripley*, 10 Wall. 339, 19 L. Ed. 955; *Alworth* v. *Seymour*, 42 Minnh. 526, 44 N. W. 1030. The decree complained of is affirmed.

ON PETITION FOR REHEARING.

(Feb. 5, 1900.)

In their petition and argument for rehearing, plaintiff's

counsel earnestly urge at least six several reasons why a rehearing should be granted in this case, with such force and sincerity as compel a careful consideration of them necessary; and, if any of them are well founded in law, rehearing should follow as a matter of course. If they are all plainly untenable, then the rights of the appellee to have a speedy end of this litigation should prevail over any disposition the court or its members may entertain of according to the attorneys the privilege of reargument for their own or their client's satisfaction.

The first position is that the Court decided the case on a point not fairly arising on the record, in total disregard of points raised in argument by counsel on either side, and fairly arising upon the record. This presents at once the question, what is the point fairly arising upon the record which was decided by the circuit court, and then brought to this Court to be reviewed by it? It was the dissolution of the plaintiff's injunction. And this is the sole point fairly arising on the record presented for the consideration of this Court, and the question is, did the circuit court err in dissolving the injunction? The circuit court's conclusion may be right, and its reasons therefor wholly wrong; yet this court will never reverse a right decision because the reasons advanced in support thereof may be baseless. It is the duty of this Court to affirm the decree, if the record justifies it, notwithstanding that the circuit court and the counsel may be laboring under an entire misapprehension as to the true merits of the controversy or the questions involved. Nor do the reasons by which the circuit court was actuated anywhere appear in this record. Counsel have seen fit to have an entertaining contest over what they consider to be the reason by which the circuit court was controlled in reaching its conclusion. This, however, is not a moot court, and cannot be governed by the consent or argument of counsel, but it must administer justice as the very right is made to appear from self-inspection of the record. This is the law, and there is no decision of any court to the contrary. It is in perfect accord with the provision of the constitution, to wit, article 8, section 5: "When a judgment or decree is reversed or affirmed by the supreme court of appeals every point fairly

arising upon the record of the case shall be considered and decided; and the reasons therefor shall be concisely stated in writing and preserved with the record of the case." It is not the opinion of the counsel as to what they consider, agree, or argue may be the points in issue, either in their petitions or briefs, but what the record itself discloses, that the court must decide. The circuit court, in determining the single point presented to this court, to wit, the dissolution of the injunction, necessarily held that the plaintiff was not entitled to the relief sought, but that its equity, for some reason, in some respect was defective. The circuit court is not required to give its reasons, and if it did, and they were insufficient, this Court would not in any sense be governed by them; but it must examine the record, and ascertain whether the decision is sustained thereby. Counsel who are presumed to be fully advised of the law have the right to set up and knock down as many straw propositions as they please, but they cannot compel the court to follow their example, or require it to be bound by their conclusions. Neither can they compel the court to enter into the discussion of propositions of law not necessary for the decision of the points of error presented to the court for its determination. This Court must presume that the circuit court was controlled by the true legal reasons justified by the record for its conclusion, rather than insufficient ones presented by the counsel in argument. Counsel undoubtedly confound the points fairly arising on the record with the legal reasons to be given in support of the decisions of such points. The authorities referred to and relied on clearly show this to be the case. For instance, the case of *Kesler* v. *Lapman*, 46 W. Va. 293, (33 S. E. 289). In this case, and numerous others, this Court has held that points not determined by the circuit court will not be considered by this Court on appeal. *Robrecht* v. *Robrecht*, 46 W. Va. 738, (34 S. E. 801); *Woods* v. *Campbell*, 45 W. Va. 203, (32 S. E. 208); *Bank* v. *Gould*, 42 W. Va. 137, (24 S. E. 547); *Alderson* v. *Commissioners*, 32 W. Va. 461, (9 S. E. 863); *Harris* v. *Hauser*, 26 W. Va. 206; *Armstrong* v. *Town of Grafton*, 23 W. Va. 50; *Burke* v. *Adair*, Id. 165. But this Court has not held nor would it possibly do so, that a wrong legal reason given

for a right decision of a point presented would render such decision erroneous, and that it would be reversed and sent back, that the court might correct its reasons to correspond with its conclusion. A point of law, while it may affect, is not equivalent to, the point of error at issue in a controversy; for it may give rise to and be governed by numerous points of law, and, while the court may be in error as to the one, it may be right as to the other. This Court is in duty bound to consider any questions of law relating to the point in issue, whether mentioned or overlooked by counsel, without notice to them; and in rule 5, § 4, of the long-established rules of this court (23 W. Va. 823), the Court gives notice that it will notice any point of error, whether assigned or not. This is its legal duty, without regard to any rule on the subject. The Court sits to administer justice, and not to teach or be taught law. When the question is a plain, legal one, it is not incumbent on the Court to call counsel's attention to it, or request argument concerning it. For the very reason that argument is not necessary in its determination. The Court must be presumed to know some of the elementary principles of law, and capable of passing thereon, without the assistance of counsel.

By its suit the plaintiff put the validity of its own lease in issue. In dissolving the injunction, the circuit court necessarily held the lease, for some reason, inoperative. The counsel in argument, give a reason for the action of the circuit court. It may be the true one, but this Court cannot be governed by it. On inspection of the lease for construction, it finds it plainly invalid for other reasons than those asserted; thus sustaining the conclusion of the circuit court. This it was its duty to do, it matters not how unfavorably such action may impress the defeated litigant, and counsel. That the decision is just, and in accordance with law, conscience, and duty, should be a sufficient shield to ward off the pointed arrows of criticising sarcasm, though poisoned with the malevolence of defeat. The clause of the lease on which counsel think this controversy hinges is a very doubtful one, susceptible of as many constructions as minds; and while, in accordance with *Bettman* v. *Harness*, 42 W. Va. 433, (26 S. E. 271); 36 L. R.

A. 566,—being merely speculative in its nature,—it should be most strongly construed against the lessee, yet any construction thereof must be subject to the most serious doubts, with the probable result of great legal injustice. Such being the case, it is far better to uphold the conclusion of the circuit court by legal propositions and application thereof to this lease, about which there can be no doubt except in minds warped and biased by some personal interest.

The second reason urged by the plaintiff is "that the conclusion reached by the Court upon the question it originated is not warranted by the law." The plaintiff, in instituting its suit to have its lease declared valid, and not the Court, originated the question involved. When it came into equity, it should have presented a lease not already avoided, and not sought the enforcement of a contract thus rendered unconscionable. Points of distinction are attempted to be shown between this case and the case of *Cowan* v. *Iron Co.* cited. That was a case to cancel a lease which the lessee claimed to be an absolute deed. The court held that because it contained a stipulation that the lessee should "have the right and privilege of removing from the said tract of land at any time any machinery, buildings, and fixtures or improvements made or erected upon it by the lessee," such stipulation authorized the lessee to terminate the lease at any time, and, the lessee having such right, the lessor could do likewise, as the right to terminate must be mutual. In the present lease the right to terminate is not left to mere inference, but it is expressly reserved to the lessee; and, after the lease had been formally terminated by the lessor executing a new lease, the lessee brings suit to enforce it. In that case the lease was for the purpose of producing metal ores; in this, it is for the production of oil. In that case the lessee was not to pay anything unless he should produce ore. In this case the lessee was not bound to pay anything unless he chose to do so. In that case the term was indefinite. In this, the term of three years is specified. In that case the lessee entered into possession, mined some ore, and made payments therefor, and then ceased operations for the reason that they were not remunerative. In this case the plaintiff neither entered into possession nor paid any ren-

tals or other consideration, until after the lessor terminated the lease by the execution of a new lease to others. In that case the lessee could have held forever, if the lease was held valid, without doing anything or paying rent. In this case the lessee could have held for eighteen months, if its claim was held valid, without doing anything or paying anything. The points of similarity as to the essentials are much greater than the points of dissimilarity nonessential in their character, so far as the law governing them is concerned. "It is a well-settled and well-known rule of law that a lease or estate which is at the will of one of the parties is equally at the will of the other party. One of them is no more and no further bound than the other. As the lessee in this case had the clear right, at his will, to terminate the tenancy at any time, so had the lessor. It cannot be otherwise." *Knight* v. *Iron Co.*, 47 Ind. 105, cited. The lease in the case just referred to was a conveyance of all the mineral coal, limestone, iron ore, fire clay, and oil, in consideration of one dollar; and it further provided for the payment after ten years of a rental of five dollars in advance, and for royalties on the coal, etc, and oil mined and produced. It contained the stipulation that the lessee "shall have the right to abandon said lands and mining at any time and remove all his buildings and fixtures from said land." The court said: "This must be regarded as the creation of an estate at will. It is a stipulation which applies to the whole interest of both parties under the instrument, and every section and clause in it. The lessee has only to will it, and every part of the instrument, and every interest under it, whether of the lessor or of the lessee, is at once at an end." This language applies equally to the surrender clause of the present lease, which is just as strong as the one under discussion, for both are as strong in favor of the lessees as language can make them. In the case of *Pidgeon* v. *Richards*, 4 Ind. 374, cited, a lease of land for a valuable consideration at the pleasure of the lessee was held to be also at the pleasure of the lessor. In the case of *Petroleum Co.* v. *Coal, Coke & Mfg. Co.*, 89 Tenn. 381, 18 S. W. 65, it was held that a mining lease for ninety-nine years was *nudum pactum*, if construed to impose no legal obligation upon the lessee to ex-

plore and discover mines, or to work them when discovered; that such construction would controvert it into a mere voluntary option, that the lessor could withdraw at any time before acceptance. Under the provisions of the lease in controversy, there was no obligation upon the lessee to explore or pay rent; but he reserved the voluntary option to surrender it at any time, without legal obligation to do anything or pay anything. Hence the lessor had the right to vacate it at any time while in an executory state. The lessees had the right at any time to say, "This lease is at an end," and thus put a complete end to the rights of both parties under it. It therefore created a mere estate at their will, and, being at their will, it was at the will of the lessor, also. There is no escape from this conclusion, and it has been the law, undisputed, from time immemorial. 2 Bl. Comm. 145; 4 Kent, Comm. 111; Washb. Real Prop. 505; Co. Inst. 55a. Nor does the three-years term agreed on change or affect this conclusion. This is merely a fixed period, without binding consideration, beyond which the lessees could not hold the estate, even by their own election, though the lessor took no action. It was to terminate the estate by its own vigor, without effort on the part of the lessors. It in no sense took away the right of the lessee to terminate the estate at his pleasure, and therefore it could not do so as to the lessor, as this right, if it exists, must be mutual; for there was no valuable or enforceable consideration for it. There was nothing binding the lessee to produce oil or gas. But the continuance of the lease was entirely dependent upon the commutation or forfeiture clause for both consideration and extension.

The third proposition relied on by the plaintiff is that, admitting the lease to create an estate at will, there was no notice to quit, and a number of authorities are cited to show that some notice is necessary for the protection of the party to be dispossessed. This may be by demand of possession or notice to quit. 4 Kent. Comm. 111; 2 Bl. Comm. 146. But where there is no possession, and no injury can result to the lessee, such as the loss of crops, a re-leasing of the same premises is a sufficient notice. Reentry is always sufficient notice, but there can be no reentry where the lessee has never been in possession. 12 Am. & Eng. Enc. Law, 757; *Kelly* v. *Waite*, 2 Bl. Comm.

146; and *Guffy* v. *Hukill*, cited in the original opinion in this case. Nor could the after reception of rent by the lessor operate as a waiver of notice in favor of the plaintiff, as against the subsequent lessees. The latter had their leases duly recorded on the 15th day of August, 1898, and thereby the plaintiff had constructive notice thereof, both at the time of its alleged payment of rent, and at the time it acquired its interest in the prior leases, to wit, the 1st day of September, 1898. It was fully advised of the appellee's rights prior to the acquirements of its interests, and legally knew that the lessor had parted with his interest to the South Penn Oil Company, and that its leases, having been thereby terminated, could not be revived by payment of rent to him, and that he had no right to receive it; but, if paid to any one, it should have been to his assigns or subsequent lessees, who had the right to refuse it, or not, at their pleasure. This is provided the subsequent lease is valid, and not in condition to be terminated at the time of the payment of the rent under the first lease, and provided, further, that the payment of the rent has the effect to renew or continue the life of the first lease. Strictly speaking, the money paid was not rent, but was commutation to secure the extension of the time of forfeiture for failure to complete a well within the period of six months elapsed from the date of the lease. Therefore its payment did not renew or keep the lease alive, except that it prevented its becoming invalid, under the forfeiture clause, as to the lessor, but not as to the subsequent lessees. It in no wise affected the surrender clause prior to the time of its payment. Nor did it bind the lessee to pay such commutation in the future. But this was still at his discretion. It was a mere voluntary payment for something already enjoyed, and not for future enjoyment Hence it could not revive a lease already terminated under a different provision, or operate as a termination of the subsequent lease. Nor was the subsequent lease in the present case in a terminable condition at the time of the payment of such commutation. While the surrender clause is somewhat similar, and sufficient to render it the grant of an estate at will, terminable by either party during its mere executory existence, there are other provisions, entirely dissimilar, which, when put into execution, destroyed for a time, at least, its terminable

character. The forfeiture clause is in these words: "Provided, however, that this lease shall become null and void, and all rights hereunder shall cease and determine, unless a well shall be completed on said premises within two months from the date hereof, or unless the lessee shall pay at the rate of twenty-five dollars and fifty cents quarterly in advance for each additional three months such completion is delayed from the time above mentioned for the completion of such well until a well is completed. Such payments may be made direct to the lessors or deposited to their credit in the Marion P. O., in Wetzel county, W. Va." This lease was executed on the 15th day of June, A.D. 1898. No pretense is made that it was terminated during the two months in which it remained in an executory state, nor is there any pretense or allegation that thereafter the commutation of twenty-five dollars and fifty cents was not paid in advance quarterly until a well was completed. The receipt of this quarterage in advance would necessarily suspend the terminable character of the estate during the time for which it was paid. In the absence of any allegation to the contrary, the presumption is that this quarterage was duly paid and received, and that the lease was at no time terminable before possession taken thereunder; and the completion of a producing well changed the lessees right of exploration into a vested estate for five years, and so long thereafter as oil and gas should be produced in paying quantities. The commutation in the plaintiff's lease was not to be paid until after the benefits were received, and was then at its option, while in the subsequent lease it was to be paid in advance, before benefits received, and failure to pay it forfeited the lease. It is true that the plaintiff would now have the surrender clause given a different construction, but the language is too plain for misconception. It is here again repeated: "And it is further agreed that the second parties, their heirs or assigns, shall have the right at any time to surrender up this lease, and be released from all moneys due and conditions unfulfilled; then and from that time this lease and agreement shall be null and void, and no longer binding on either party, and the payments which shall have been made be held by the party of the first part as the full stipulated damages for non-fulfill-

ment of the foregoing contract." If no payments have been made, although due, the lessor receives nothing, as all moneys due are to be released, all conditions unfulfilled to be discharged, and the agreement to be no longer binding on either party. Language could not be made stronger to relieve a lessee from all obligation at his own will and pleasure.

The fourth contention of the plaintiff is that its lease is not a *nudum pactum*, without consideration, and void by reason thereof. It insists that it is made under seal, which imports consideration, and that a party to it cannot avoid it, for this reason. This would be true at law. 3 Am. & Eng. Enc. Law, 827; *Harris* v. *Harris*, 23 Grat. 738. It is not true in equity. "It is a fundamental principle of equity to refuse aid to the enforcement of executory deeds, unless founded upon either a good or a valuable consideration. The presence of a seal does not, in equity, import a consideration." It has no force. 6 Am. & Eng. Enc. Law, (2d Ed.) 683; Adams, Eq. 78; Fry, Spec. Perf. § 96; Pom. Spec. Perf. § 57; *Lamprey* v. *Lamprey*, 29 Minn. 151, 12 N. W. 514; *Buford's Heirs* v. *McKee*, 1 Dana, 107. If there was any consideration for the lease, other than that mentioned in the lease, it was the duty of the plaintiff to allege it; otherwise, the contract itself is conclusive on this question. The only considerations mentioned in the lease are the royalties and rentals on oil and gas to be produced, and the commutation for failure to complete a well. The plaintiff was not bound to complete a well in any given time, or during the life of the lease, so as to produce oil royalties or gas rentals, but in lieu thereof might pay a commutation, which he reserved the right to defeat at any time before payment enforced by surrender of the lease. It was entirely optional with him to bore or not, or pay or not. He was not bound to do either, but could decline to do both. This lease is not capable of any other construction. A consideration mentioned which is not legally enforceable is equivalent to no consideration, and a contract dependent thereon is as much a *nudum pactum* as if no consideration were mentioned. "Where two parties to an instrument enter mutual covenants which are interchangeable considerations for each other, if either party

neglects or refuses to bind himself he thus renders the instrument void for want of mutuality, and he cannot avail himself of it as obligatory upon the other, nor can he render it obligatory upon the other by any subsequent act of his own, without the latter's assent." *Dodge* v. *Hopkins*, 14 Wis. 630. "Want of mutuality in the inception of the contract may be remedied by the subsequent conduct of the parties, or by the execution of the agreement." 7 Am. & Eng. Enc. Law, (2d Ed.) 114, 115. Plaintiff's lease shows on its face that it was entirely optional with the lessee to perform it, or not, at its pleasure; and the Pennsylvania cases referred to in argument do not militate against this construction, for it is impossible to give it any other. In the case of *McMillan* v. *Philadelphia Co.*, 159 Pa. St. 142, 28 Atl. 220, the language, "he [the lessee] having the option to drill the well or not, or pay said rental or not," was held not to give the lessee the option to refuse to do both, but that he must do either the one or the other, to render them consistent with other provisions of the lease. The same holding was had in the case of *Jackson* v. *O'Hara*, 183 Pa. St. 233, 38 Atl. 624. These decisions are not applicable to this case, for it is impossible to construe plaintiff's lease so as to take away its optional right to surrender it at its pleasure, without paying anything therefor. The surrender clause in the lease construed in the case of *Hooks* v. *Forst*, 165 Pa. St. 246, 30 Atl. 846, is in the exact language contained in the plaintiff's lease. But the former lease contains no forfeiture clause, and in the granting clause the consideration of one dollar in hand paid is acknowledged, and it is further stipulated that the lessees should pay one hundred dollars per month, begining with the date of the lease, until a well is completed, the payments being made in advance; and the following receipt is embraced in the lease: "November the 30th, 1889. Received from Lahey, Campbell and Stoughton $100 for rent on lease in full to December the 30th, 1889." The lease also acknowledges the first payment, for the month of November. The lessor, receiving a valuable consideration for the term, could not terminate the lease until the end thereof, although it was still at the will of the lessor, who had the right to waive his payments and terminate the

lease at his pleasure. The January payment becoming due, the lessees asked for three weeks to make it, and, in case it was not then made, agreed that the lessor might consider the lease abandoned, and relet to others. The court held this to be a surrender of the lease, although it was not actually given up, and that the lessees could not afterwards tender the payments due, and thereby renew it, without the consent of the lessor. The case of *Roberts* v. *Bettman*, 54 W. Va. 143, (30 S. E. 95), has no application, whatever to the present case. That was a suit at law for rentals. In that case, while both parties had the right to terminate the lease, one under the forfeiture clause, and the other under the surrender clause,—neither took the necessary steps to do so, but the lease was allowed to continue in existence for the benefit of the lessee; and the court held the lessor was entitled to his rentals until the lessee terminated the lease by a surrender thereof. It was admitted that both parties had the right to terminate it, but that neither had done so. Nor was the lease invalid for want of consideration, for the lessee stipulated to pay one hundred dollars per month in advance until a well was completed, or until he surrendered the lease, and only thereafter was he to be relieved from the monthly payments. The two clauses of forfeiture and surrender were held not to be self-acting, but to require some action on the part of one or both the parties to terminate the lease, and the termination thereof only destroyed the after-accruing rights of the parties. The plaintiff's lease, on the other hand, failed to legally bind the lessee to pay any rentals for (as claimed by it) eighteen months, and then, as it now would rather not claim, on mere surrender released it from all moneys due,—a generous lease to the lessee, but unfair to the lessor. It is true that most oil leases have a surrender clause, but it is also just as true that, as to consideration, they vary as the leaves of the forests; and the consideration, in so far as the lessor is concerned, governed the surrender clause. Without consideration, an executory lease may always be vacated or terminated; with valuable consideration, it cannot be. The length of the term or the character of the estate makes no difference. The courts will not enforce executory contracts not on con-

sideration deemed good or valuable in law. *Barrett* v. *McAllister*, 33 W. Va. 738, (11 S. E. 220), has no application to this case, for the reason that the appellee's subsequent lessees are presumed to have been aware of the invalid character of plaintiff's lease at the time they obtained their lease. They knew that the plaintiff had the right to terminate, and that he could not thereafter renew it in derogation of their rights acquired for valuable consideration. Nor could plaintiff's lease be treated as an ordinary option for sale or rent, for the reason that it was for a term that might expire before plaintiff made up his mind to accept it and thus the lessors' estate involved be lost, without a compensation to him therefore. A man offers to lease a house to another for one year, beginning at a certain date, for one hundred dollars; the tenant to have the liberty to pay or not to pay the rent, if he chooses. The tenant, to make this contract binding, must either pay, or agree in advance to pay, the rent; and he cannot wait until the term expires before binding himself. Otherwise, the lessor loses his term, and receives nothing for it. If the tenant is not legally bound to pay the one hundred dollars, the contract is void; for it is founded on a nonenforcable consideration, which is equivalent to no consideration. The landlord is neither bound to give the tenant notice, nor await until the expiration of any part of the proposed term, before reletting to some one else; but it is the duty of the tenant to notify him of acceptance before the beginning of the term, which he may do by paying or agreeing to pay the rent. The most that can be said of this lease is that it was no more than an option, without consideration, which might be withdrawn at any time before acceptance; and the leasing to another, with or without notice to the prior lessee, was a withdrawal thereof. *Coleman* v. *Applegarth*, 68 Md. 21, 11 Atl. 284; *Dickinson* v. *Dodds*, 2 Ch. Div. 463; Pom. Spec. Perf. §§ 60, 61.

The fifth contention of the plaintiff is that the court erred in holding that its bill was in its nature a suit for specific performance, and subject to the equitable rules that control relief in such cases. It is probably true that the plaintiff might have brought a suit in ejectment or unlawful detainer for the enforcement of its lease, but it

chose to come into equity. Counsel should not permit the ill-considered remarks of a judge to mislead them as to the law, for judges may err. Equity has the right to specifically enforce leases, and the covenants therein contained, when relief at law is inadequate. In the case of *Clay* v. *Powell*, 85 Ala. 538, 5 South. 330, it was held that a bill would lie to enforce a covenant in a lease, "upon the principles analogous to those governing the equitable remedy of specific performance." And in 22 Am. & Eng. Enc. Law, 972, the law is stated to be, "Leases of real estate, agreements to lease, and contracts in relation thereto, including covenants in contracts of lease, are enforceable specifically." The alleged ground of equitable relief is the prevention of waste or irreparable injury, but, having taken jurisdiction for one purpose, equity will go on to give full relief. *Bettman* v. *Harness*, 42 W. Va. 433, (26 S. E. 271), 36 L. R. A. 566, cited. Specific execution is not confined to the making of deeds, but is the giving of any relief the nature of the case may demand. 22 Am. & Eng. Enc. Law, 1079. Equity does not merely stay waste, and send the plaintiff to law to establish its title and enforce its contracts, but it goes on to specific execution thereof. Plaintiff prays that this be done; that its leases may be held to be valid and subsisting, and the subsequent leases invalid, and that it be decreed to have the exclusive right to operate for oil and gas on the lands involved; and that the subsequent lessees be enjoined from preventing it from taking possession thereof, and be required to account for the value of the oil already produced. If this is not enforcing specific performance of this contract, what is it? It is certainly not a divorce suit, or a bill to dissolve a corporation. It is, however, an ejectment in chancery. Ejectment is the proper remedy for enforcing specific performance at law. To declare a contract valid, preserve the subject-matter thereof, and turn it over to the contractee, is certainly specific performance of such contract; and the difference being that when tried at equity or at law, the separate rules as to relief governing the separate tribunals must prevail,—one being a court of conscience, and the other adhering to legal principles. The very basis of plaintiff's suit is the enforcement of its contract and it

seeks a court of equity because of the broader and more satisfactory and adequate relief afforded. In doing so, it must submit to the rules of equity. "It is a general principle that when, from personal incapacity, the nature of the contract, or any other cause, a contract is incapable of being specifically enforced against one party, that party is equally incapable of enforcing it specifically against the other." *Marble Co.* v. *Ripley*, 10 Wall. 359, 19 L. Ed. 962. This is through want of mutuality, which governs relief both in courts of law and equity. For instance, in the present case the payment by the plaintiff of the commutation was for an expired term, and there was no binding, legal obligation on it to pay any further rental, or do or perform anything further under the lease, and the lessor was powerless to enforce specific performance thereof. Hence equity is justified in refusing relief to the plaintiff. At all times it had the lease at its will, without being legally obligated thereby. The lease, if treated as mutually terminable at will, is not unfair, but, if construed according to plaintiff's contention, it is itself the best evidence of its unfairness. Without any present consideration therefor, it seeks to bind the lessor's land for the period of three years. It assures the completion of a well in six months, or in lieu thereof the payment of one dollar per acre per annum until a well is completed, without fixing a certain time of payment, and then provides for surrender at any time, and release of all moneys due. The forfeiture clause is clothed in such ambiguous language that highly eminent counselors and judges learned in the law differ as to its meaning, and yet, "an old, feeble man easily influenced," is expected to fully comprehend it. "Those engaged in the production of oil send agents armed with printed leases to solicit leases, and they take leases for great areas, and they are forms already prepared; and the people in many instances know little of them, are inexperienced in oil operations, and are without legal advice. They rely on the agent." Such leases should be construed most strongly against him who solicited and prepared them. *Bettman* v. *Harness*, 42 W. Va. 448, (26 S. E. 271), 36. L. R. A. 566, cited. Plaintiff insists that this lease should be construed

as a whole, and so as to make it binding on the parties. It is impossible, against its express provisions, to construe it so as to bind the lessees, who reserved to themselves the right to vacate it at any time. Yet it might have been construed so as to bind the lessor, had the lessees at the proper time insisted on such construction, and complied therewith. No time is fixed for the payment of the commutation money, except that it is to be thereafter; that is, after the expiration of the six months allowed for the completion of a well. It is to be at the rate of one dollar per acre per annum. The words "per annum" were undoubtedly used to fix the rate, and not the date of payment, and for no other purpose, so that the lessees could have as well claimed that the time of payment was to be at the end of twenty-four as twelve months, after the expiration of the six months, or they might have claimed it to be at the expiration of the lease, except that would give no time for forfeiture. The plain object of this provision was to secure the completion of a well, or the forfeiture of the lease. In oil leases, generally, this commutation money is required to be paid in advance of the term covered by it, so as to form an executed consideration therefor; and, in case of failure to pay, the lease becomes immediately forfeitable. In this lease it is indefinite, except that it is to be paid in lieu of, and after, the failure to complete the well within six months from its date. Then, if the well is not so completed or the rentals paid, the lease becomes null and void. A reasonable construction would be that the lessees were to complete a well within six months, and on their failure to do so, or immediately thereafter, the lease was to become null and void, unless they forthwith paid in advance at the rate of one dollar per acre per annum for an extension of the lease until such time as they could reasonably hope to secure the completion of a well, not exceeding the term limit. This would be carrying out the main purposes of the lease on the part of the lessor, to wit, the production of oil and gas, and would have changed the character of the estate from one at will to one of a fixed term. And this is the only way to construe this lease so as to render it just and equitable to the lessor. The lessee having the surrender clause for his release, the only way to bind him

is to require the commutation money for a limited term to be paid in advance, thus furnishing the lessor consideration for his forbearance. Then, if the lessees fail to pay and are insolvent, the lessor can protect himself by forfeiture. But if the commutation is not to be paid until the end of the term, at the pleasure of the lessee, the only protection the lessor can have is to terminate the lease under the surrender clause. Such a construction as this destroys the plaintiff's rights, as it renders the lease forfeitable at the end of six months from its date. And this is the only construction that will make it a binding lease on the plaintiff at that date. In all such cases the commutation money should be payable in advance, unless there is a valuable consideration which will make it nonforfeitable for the term the lease is to run.

The lease from which this one was evidently copied (*Hooks* v. *Frost*, 165 Pa. St. 246, 30 Atl. 846) required such advance payment; but the draftsman of this evidently wanted to place the lessee in condition to surrender the lease at any time without being obliged to pay the commutation money or other rental. It may have been through ignorance. But, ignorance or not, he dug the pit, and his friend fell into it. Many do likewise. He is not the only pebble.

The sixth and final contention of the plaintiff is that the court ignored the plaintiff's claim to the one-eighth of the oil, being the royalty due the lessor, which is a point in argument insisted as fairly arising on the record. This is a point that has not been properly presented to, or decided by, the circuit court, and therefore does not fairly arise upon the record, but is unfairly presented here. The appeal in this case was from the order dissolving the injunction for want of equity. The relief sought is not against the lessor, but his subsequent lessees; and the prayer is not for the oil in kind, but that an account might be taken of the amount and value of the oil, and that the South Penn Oil Company might be required to pay the value thereof to the plaintiff. The ground for jurisdiction in equity was the staying of waste, and the prevention of irreparable injury. In upholding the subsequent leases, the court decided the equities against the plaintiff; and if

it has a claim to the royalties, or the value thereof, the remedy at law is ample. It is only a pecuniary question, which can be compensation in damages, or the royalty can be recovered by appropriate action. Neither the South Penn Oil Company, the pipe-line company to whom the oil is delivered, nor the common lessor, is shown to be insolvent. There are no sufficient allegations touching this royalty alone that will give equitable relief. Not only is this true, but it is also a serious question whether the plaintiff can set up any claim to this royalty under its lease by virtue of its payment of the commutation money. As heretofore shown, this money was paid for an expired term, and not for a future term. Plaintiff's lease does not legally bind it to pay anything for a future term covering the time of the production of this royalty, but it may terminate the lease at any time by surrender, and be released from all moneys due or to become due. Hence it cannot have this royalty, not having paid the consideration therefor, without the assent of the lessor, who has not been properly impleaded in relation thereto. The commutation already paid is for a past term, when neither of the lessees had possession of the land. Its payment is equivalent to sinking a dry hole. *Steelsmith* v. *Gartlan*, 45 W. Va. 27, (29 S. E. 978). The subsequent lessees then entered, and found oil, and began producing the royalty. It does not appear whether the plaintiff paid the annual commutation money, which according to its own contention, would come due on the 11th day of November, 1899, in stead of in advance on the 11th day of November, 1898; and, if it was not so paid, its lease would certainly now be forfeited, and it would have no claim to the royalty.

All these various contentions of the plaintiff for a rehearing are wholly untenable, without legal support, and do not justify a continuance of this litigation. The rehearing should be refused.

Affirmed.

CHARLESTON.

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TREES v. ECLIPSE OIL CO. *et al.*

Submitted Sept. 13, 1899—Decided Nov 28, 1899.

1. OIL LEASE—*Construction.*
   An executory oil and gas lease, which does not bind the lessees to carry out its covenants, but reserves to them the right to defeat the same at any time, and relieve themselves from the payment of any consideration therefor, is invalid to create any estate other than the mere optional right of entry, which is subject to termination at the will of either party. (p. 108).

2. OIL LEASE—*Termination.*
   Such executory lease is terminated by the death of the lessor. (p. 108).

3. OIL LEASE—*Rights and Privileges.*
   A person holding a valid executory oil and gas lease, executed by several of the number of co-tenants, has such an inchoate interest in the land subject to such lease as will enable him to maintain an injunction to prevent a wrongdoer from committing waste by the extraction of such oil and gas. (p. 108).

Appeal from circuit court, Wetzel County.

Bill by J. C. Trees, against the Eclipse Oil Company and others. Decree for plaintiff. Defendants appeal.

Affirmed.

HUBBARD & HUBBARD, J. B. SUMMERVILLE, and ROBERT MCELDOWNEY, for appellants.

T. P. JACOBS, GEORGE L. ROBERTS, and CHARLES GIBBS CARTER, for appellee.

DENT, PRESIDENT:

The Eclipse Oil Company appeals from a decree of the circuit court of Wetzel County, overruling its motion to dissolve an injunction obtained against it by J. C. Trees, restraining it "from constructing and erecting any oil derrick

or rig and machinery upon the tract of 200 acres of land known as the 'John Hafer Land,' lying in Proctor district, Wetzel county, and also from drilling or boring oil or gas wells on said tract of land." The defendant claims under a similar lease, in all respects, as the one passed on in the case of the Eclipse Oil Company against the South Penn Oil Company at this term of the court; and the same objections that apply to that lease are also present in this one. It was executed by John Hafer, now deceased, on the 16th day of August, 1898, and nothing was done in any manner in furtherance of the objects thereof during his lifetime. Some time after his death, and just within eighteen months of the date of the lease, the Eclipse Oil Company, assignee of the lessees, claim to have paid the annual rental provided for in case of failure to complete an oil well within six months, to the administrator of the deceased, and that the same went into, and was distributed as a part of his estate. Prior to such payment the widow and heirs of the deceased, some of whom were infants, executed an oil and gas lease to the plaintiff, Trees, on the same tract of land. After this last lease was executed the defendant entered upon the land, and began preparations for sinking a well. This injunction followed. As held in the case of *Eclipse Oil Co.* v. *South Penn Oil Co.*, 47 W. Va. 84, (34 S. E. 293), the lessees not being bound to comply with any of the covenants or stipulations of the lease with regard to boring for oil and gas or the payment of the rent, but having the reserved right to vacate the lease at any time they might see fit, and then wholly escape its obligations, the lessor was entitled to do likewise; thus rendering it a mere right of entry, to be terminated at the will of either party thereto while it remained in an executory condition. Such being its character, the death of John Hafer put an end to it. 12 Am. & Eng. Enc. Law, 758b. The defendant's lease being invalid, its act in entering on the land for the purpose of boring for oil was a wrong and a trespass to which any of the co-tenants or their lessee had the right to object; and, while the lessee's right to explore for oil was not perfected, yet he had such an inchoate right that a court of equity will protect against a trespasser or wrongdoer. While one co-tenant may not bore for oil, he can

prevent others from doing so, whether they are co-tenants or trespassers. And he may transfer this right to a lessee. A gas and oil lease carries with it such authority. By payment of rentals to the administrator, the defendant could not revive its defunct lease. As the real parties to the injunction were before the court, the objection that other persons were necessary to the suit, whose interests were involved therein, could not arise on a preliminary motion to dissolve such injunction. The plaintiff having shown a strong equitable right, the injunction should be continued until the final hearing. The decree is affirmed.

Affirmed.

CHARLESTON.

AMOS v. STOCKERT.

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Submitted Jan. 14, 1899—Decided Nov. 28, 1899.

1. PLEADING AND PRACTICE—*Rejection of Plea.*
   If the court make an order rejecting the plea, it may, in its discretion, at a subsequent term allow the same plea filed, when it appears that it had been improperly rejected, imposing such conditions upon the moving party as to costs or continuance of the case as may seem just. (p. 119).

2. DEFAMATION—*Justification—Pleading.*
   In an action for defamation, if the defendant would rely on the truth of the matter declared on, he must plead it specially, or he can not give it in evidence at the trial, even in mitigation of damages. (p. 119).

3. DEFAMATION—*Justification.*
   When a defamatory charge is made in general terms, it can only be justified by specification of the facts which are relied on to establish its truth. (p. 121).

4. HARMLESS ERROR—*Defamation—Plea of Justification.*
In an action for defamation, where a special plea of justification is permitted to be filed, which undertakes to justify all the charges in the declaration, but is insufficient in its specifications as to any of them, and other special pleas are filed, justifying, by proper specifications, certain of the charges, and on the trial it appeared that the defendant offered no evidence to the jury to prove the truth of any of the charges not specifically justified in such other pleas, the appellate court will regard the filing of said insufficient plea as harmless error. (p. 121).

5. CONTINUANCE—*Discretion of Court.*
The question of continuance is one addressed to the sound discretion of the court, and, unless it is plainly apparent that such discretion has been abused, this Court will not interfere therewith. (p. 125).

Error to circuit court, Upshur County.

Action by H. B. B. Amos against G. F. Stockert. Judgment for defendant, and plaintiff brings error.

Affirmed.

W. W. BRANNON, and J. C. MCWHORTER, for plaintiff in error.

A. M. POUNDSTONE, W. B. MCGARY, and U. G. YOUNG, for defendant in error.

MCWHORTER, JUDGE:

H. B. B. Amos brought his action of trespass on the case in the circuit court of Upshur County against G. F. Stockert, and filed his declaration, as follows: "H. B. B. Amos complains of G. F. Stockert of a plea of trespass on the case for this, to wit: That, whereas, the plaintiff is now, and has been continually for a great number of years, a minister of the gospel, depending wholly upon his work as such minister for the support of himself and his family, is a good, true, just and honest citizen of this state, and as such hath always behaved and demeaned himself, and until the committing of the grievances by said defendant, as hereinafter mentioned, was always reputed, esteemed, and accepted by and amongst all of his neighbors, and other good and worthy citizens of this state to whom he was known, to be a person of good name, fame, and credit,

whereby the plaintiff, before the committing of the several grievances by the said defendant, as hereinafter mentioned, was recognized and esteemed as being a minister of good moral character, as a person who was virtuous, upright, honest, and faithful in the discharge of his duties as a citizen and as a minister of the gospel as aforesaid, and has deservedly obtained the confidence and good opinion of all his neighbors, and of other good and worthy citizens of this state to whom he was known, both as a minister of the gospel, as aforesaid, and as a citizen of this state. And the plaintiff says that the said defendant, well knowing the premises, but contriving and wickedly and maliciously intending to insult the plaintiff, did, on the — day of ——, 1895, in the presence of L. A. Simons and other good and worthy citizens of this state, then and there, in the presence and hearing of the said last-mentioned citizens, falsely and maliciously, and with intention to insult the plaintiff, speak and publish of and concerning the plaintiff the false, scandalous, malicious, defamatory, and insulting words following, which the plaintiff avers to be, from their usual construction and common acceptation, construed as insults, and tend to violence and breach of the peace; that is to say: 'The Reverend Amos (meaning the plaintiff) has been twice egged out of his own county. I know this is a fact, and can prove it.' 'He (meaning the plaintiff) parted a man and his wife, and ran off with the man's wife, leaving his own wife and children.' 'Parties (naming them) told me that he (meaning the plaintiff) would have better clothes, and would appear more decent, if he (meaning the plaintiff) would not spend his time running after so many dirty bitches, and spend his money riding on the train with them.' Also, on the —— day of ——, 1895, in the presence of Frederick Cutright and other good and worthy citizens of this state, the said defendant, with a like intent upon his part, uttered and published the following false statements of and concerning the plaintiff; that is to say: 'I have been in Lewis county, near the work of Reverend H. B. B. Amos (meaning the plaintiff), and people told me there that he was a man of very bad character; that he spent his money running after women of bad character, and paying their fare on the train.' 'Amos (meaning the

plaintiff) can stand in the pulpit and preach a lie with more grace than any man I ever heard preach.' Also, on the —— day of ——, 1895, in the presence of J. W. Simons, and other good and worthy citizens of this state, the said defendant, with like malicious intent upon his part to slander and injure the plaintiff, did utter and publish the following false and scandalous, malicious, defamatory, and insulting words of and concerning the plaintiff; that is to say: 'If the Camp boys catch H. B. B, Amos (meaning the plaintiff) out, it will be worse for him than the egging he got in Braxton county.' 'He, (meaning the plaintiff) has been running over his circuit with other women, spending his money, leaving his family to make a living for themselves.' He (meaning the plaintiff) treats his family worse than a dog when he is at home.' The plaintiff avers that all the foregoing words, statements, and utterances made and published by the defendant of and concerning the plaintiff in the presence and hearing of the various parties herein mentioned, together with many other words, statements, and utterances of like meaning, character, and import, uttered and published of and concerning the plaintiff in the presence and hearing of many other good and worthy citizens of this state, were so uttered and published by the defendant falsely and maliciously, and with intent to insult the plaintiff; which said words, statements, and utterances the plaintiff avers are false, scandalous, malicious, defamatory, and insulting, and, from their usual construction and common acceptation, are construed as insults, and tend to violence and breach of the peace. By means of which said premises to the plaintiff has been greatly injured in his good name, fame, and credit, and has been especially injured in his profession as a minister of the gospel, as aforesaid, and otherwise greatly injured and damnified, to the damage of the plaintiff five thousand dollars ($5,000). And therefore he sues.

On the 8th day of October, 1895, the judge of the court being so situated as to the case that he could not properly try it, Hon. John Brannon was duly elected to hear and determine it, and took the oath prescribed by law for such special judge. On the 9th of October the defendant pleaded not guilty, and issue was joined thereon, and de-

fendant tendered three special pleas in writing, numbered 1, 2, and 3, respectively, and asked leave to file the same, to which filing the plaintiff objected, which objection was sustained by the court, and the pleas rejected, to which ruling the defendant excepted, and the cause was continued on motion of the plaintiff. On the 10th of February, 1896, Special Judge Brannon tendered his oral resignation as such, which was accepted by the court, and on the 11th of February, 1896, Hon. C. C. Higginbotham was elected and qualified as such special judge to try the case, and the defendant, by leave of the court, filed his plea No. 4, of the statue of limitations, to which the plaintiff replied generally, and issue was thereon joined. A jury was then duly impaneled and sworn to try the issues joined, and a true verdict give according to the evidence, and the jury were adjourned and the trial continued until next morning. The defendant tendered his three special pleas numbered 1, 2, and 3, and asked leave to file the same, and the plaintiff objected to such filing, but the court overruled the objection, and allowed them to be filed, and plaintiff to each of said pleas replied generally, and issue thereon joined, and the evidence was partly taken, and the jury adjourned until next morning. On the 13th day of February the jury and the parties again appeared, and "the defendant moved the court to set aside the order entered herein on the 11th day of February, 1896, commencing on page 357, commencing in the words following: 'This day came the parties by their attorneys,' and ending with these words, 'Continued until tomorrow morning at 8 o'clock.' It was ordered that same be, and the same is hereby, set aside, and the trial was again proceeded with," etc. The trial continued from day to day until the 19th of February, when the jury returned a verdict for the defendant.

On the 21st of February "the plaintiff moved the court to set aside the verdict of the jury and grant him a new trial on the following grounds: First, because the court erred in allowing the defendant to file his three pleas Nos. 1, 2, and 3, they having been once tendered, and rejected by the court; second, because the court erred in overruling the motion of the plaintiff for a continuance of this cause at the costs of the defendant upon the filing of said pleas in

open court, and forcing plaintiff to go to trial or take a general continuance; third, because the verdict is contrary to law and the evidence; fourth, because the said verdict is manifestly contrary to the instructions given by the court to the said jury; and, fifth, for various other errors appearing upon the record in this cause,—and said motion, being argued by counsel and maturely considered by the court, is overruled. And to the opinion of the court in so overruling his said motion for a new trial the plaintiff excepted," and the court entered judgment on said verdict.

Plaintiff filed his bill of exceptions, duly signed, and made a part of the record, which bill of exceptions sets out the said three pleas *in entenso*, and designates them as being the same pleas which were tendered and rejected by the court at the October term, 1895:

"Plea No. 1. And said defendant, for further plea in this behalf, says that the plaintiff ought not to have or maintain his aforesaid action thereof against him, because he says, as to the speaking of the words in the plaintiff's declaration set forth and contained, said plaintiff, before publishing and speaking of said several words of and concerning said plaintiff, as in said declaration mentioned, had been twice egged out of his own county, and said plaintiff had parted a man and his wife, leaving his own wife and children, and parties had told the defendant that he (the plaintiff) would have better clothes, and would appear more decent, if he had not spent his time running after so many dirty bitches, and spent his money riding on the train with them; and defendant alleges that what was told him as aforesaid is true. And defendant further says that, before the speaking and publishing of the said several words of and concerning the plaintiff as in said declaration mentioned, said defendant had been in Lewis county, near the work of said plaintiff, and people had told defendant there that said plaintiff was a man of very bad character, and he (said plaintiff) had spent his money running after women of bad character, and had paid their fare on the train; and defendant alleges that what was told him as last aforesaid is true. And defendant further says that, before the speaking and publishing of said several words of and concerning said plaintiff as in said declaration mentioned, said plain-

tiff has stood in the pulpit, and preached and spoke a lie with more grace than any man defendant had ever heard preach. And defendant further says, before the speaking and publishing of said several words of and concerning said plaintiff as in said declaration mentioned, defendant did say, if the Camp boys had caught said plaintiff out, it would have been worse for him than the egging he got in Braxton county; that said plaintiff had been egged in Braxton county; that said plaintiff had been running over his circuit with other women; that said plaintiff had been spending his money, leaving his family to make their living for themselves; that said plaintiff had treated his family worse than a dog when he was at home. Wherefore said defendant did speak and publish said words of and concerning said plaintiff as in said declaration as he lawfully might for the cause aforesaid, and this said defendant is ready to verify; wherefore said defendant prays judgment if said plaintiff ought to have and maintain his aforesaid action thereof against him.

"Plea No. 2. And said defendant, for further plea in this behalf, says that the plaintiff ought not to have and maintain his aforesaid action thereof against him, because he says, as to the speaking of the alleged words to plaintiff's declaration set forth and contained, as follows: "The Reverend Amos has been twice egged out of his own county.' 'I know this is a fact, and can prove it.' 'He parted a man and his wife, leaving his own wife and children.' 'Parties told me that he would have better clothes, and would appear more decent, if he would not spend his time running after so many dirty bitches, and spend his time riding on the train with them,'—which are alleged to have been spoken in the presence of L. A. Simons and others, to wit, the —— day of ——, 1895,—defendant denies that he ever made any such statements in the presence of Lucy A. Simons and others, but admits that on the —— day of ——, 1895, in the presence of Frederick Cutright and others, he did state that parties had told him (to wit, Samuel Ballard and his wife told defendant) that plaintiff would have better clothes if he had not spent his money riding on the train with dirty women, and paying their fare; which statements so made to the defendant by said

Ballard and wife defendant alleges as true. And defendant further says that, in the presence of said Frederick Cutright and others, he made the following statement: 'I have been in Lewis county, near the work of Rev. H. B. B. Amos, and people told me there (to wit, Samuel Ballard and wife) that he (said Amos) was a man of very bad character; that he spent his money running after women of bad character, paying their fare on the train.' And defendant alleges that said statements are true. Defendant denies that he made the following statement to any person, alleged in plaintiff's declaration; 'Amos can stand in the pulpit and preach a lie with more grace than any man I ever heard preach;' and defendant denies that he made the alleged statements to J. W. Simons, or any other person, on the —— day of ——, 1895, that is to say: 'If the Camp boys catch H. B. B. Amos (meaning the plaintiff) out, it will be worse for him than the egging he got in Braxton county.' 'He (meaning the plaintiff) was egged in Braxton county, and it can be proved.'' 'He (meaning the plaintiff) has been running over his circuit with other women, spending his money, leaving his family to make their living for themselves.' 'He (meaning the plaintiff) treats his family worse than a dog when he is at home.' And this the defendant is ready to verify. Wherefore said defendant prays judgment if said plaintiff ought to have and maintain his aforesaid action thereof against him.

"Plea No. 3. And said defendant, for further plea in this behalf, says that the plaintiff ought not to have or maintain his aforesaid action thereof against him, because he says, as to the speaking of the words in the plaintiff's declaration set forth and contained, the said plaintiff, before the speaking and the publishing of said several words of and concerning the said plaintiff as in the said declaration mentioned, to wit, on the —— day of April, 1895, did get on the cars of the West Virginia & Pittsburg Railroad at a station on the line of said road known as 'Burnsville,' in Braxton county, West Virginia, with one Edna Self, and ride on said road to the town of Sutton, in said Braxton county; and early on the following morning the said plaintiff, H. B. B. Amos, in company with said Edna Self, boarded said train at a station at or near the junction of said road at

Flatwoods siding, a distance of seven miles from Sutton, in Braxton county, and ride on said train to the town of Burnsville; and on divers other occasions said plaintiff rode over said road on the train with said Edna Self; and that said plaintiff was seen frequently and many times, both day and night, in company with said Edna Self, locked arms, walking along and over the line of said road, and both were known as and called 'track-walkers;' and that said Edna Self was then known and reputed to be a common, loose, immoral woman in the community, and of this fact plaintiff had full information, or had been so notified or warned, the said Edna Self being a married woman at the time, and living apart from her husband; and during the time of the separation of said Self woman from her husband, in the year 1894, she and said plaintiff were caught and found in unbecoming, indecent postures and positions, to wit, locked in each others' arms, and lying in the lap of said plaintiff. And the said plaintiff, before the speaking and the publishing of the said several words concerning the said plaintiff as in the said declaration mentioned, to wit, in January and February, 1895, did also, in the county of Upshur, state of West Virginia, at and near the places known in said county as 'Indian Camp' and 'Waterloo,' associate, travel, and go around with one Lucy A. Simons, a woman of bad character, loose morals, of which the said plaintiff had full information and knowledge, and, notwithstanding his possession of said knowledge and information of the character of the said Lucy A. Simons, he brought her to the homes of respectable people, and intruded her upon their hospitality, without their consent, and invitation to do so; and in said month of January, 1895, or about that time, the said plaintiff preached a violent invection and bitter sermon at Waterloo Church, in the county of Upshur, at a large congregation of the best and most respected people in that vicinity, in which he (the said plaintiff) used the following language, or words to that effect: 'Mrs. Lucy A. Simons is a credit to any of you women.' She is a woman of chastity and virtue, and you are a set of red-tongued liars. I have a thousand dollars to spend on defense of Mrs. Simons and myself, and, if that don't take us through [raising his fists], these will,'

—which statements are false. Also, said plaintiff, at Indian Camp Church, in said Upshur county, about February, 1895, while preaching a sermon, stated and declared that one Judge W. G. Bennett told him (plaintiff) that he (plaintiff) had authority and the power as a minister to compel and require any and all persons who attended his services to kneel down, and, on their failure or refusal to do so, he (the plaintiff) had the right to arrest them, and have them indicted, or words to that effect,—all of which statements were untrue and false. And in the year 1894 said plaintiff, on Oil creek, in Lewis county, went with said Edna Self, to the house of William G. Godfrey. Said plaintiff knocked on the door of said Godfrey's residence, and asked Mrs. Godfrey whether she had room for two stragglers, to wit, himself and Edna Self, and Mrs. Godfrey replied, 'I have room for you (meaning the plaintiff) but I won't keep that woman,' whereupon, though very late at night, the plaintiff declined to stay all night, and departed with said woman, and walked a distance of three miles, where he and the said woman remained the rest of the night. And the defendant further alleges that the plaintiff, in the year 1894, did cruelly mistreat his family, and his failing and neglect to provide necessary provisions for the comfort and sustenance of his family; and this the said defendant is ready to verify. Whereupon he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against him," etc.

Plaintiff obtained a writ of error, assigning the following errors: "First, because the court erred in allowing the defendant to file his three pleas Nos. 1, 2, and 3, they having been once tendered, and rejected by the court; second, because the court erred in overruling the motion of your petitioner for a continuance of this cause at the costs of said defendant upon the filing of said three pleas in open court, and in forcing your petitioner to go to trial, or take a general continuance of the cause; third, because the verdict is contrary to the law and the evidence; fourth, because the said verdict is manifestly contrary to the instruction given by the court to the jury; and, fifth, for various other errors appearing upon the record in this case. And your petitioner further represents that the

said judgment is in other respects uncertain, informal and erroneous."

I am at a loss to know which order made on the 11th day of February was set aside by the order entered on the 13th day of the same month. It is described as commencing on page 357 (presumably of the order book). As there are two orders bearing that date, and nothing in the record to show the page of the record book where they are recorded, it is impossible to know which order is thus set aside. The first of such orders is that filing defendant's plea of statute of limitations and impaneling the jury, and the other the order filing defendant's three special pleas. If the former was set aside, then there was no jury left to try the case; if the latter, the three pleas were stricken out, there being no record to connect them with the case. But it appears from the record that both the jury and the three pleas were treated as being in the case; the one to try, and the others to be tried. It is insisted by appellant that the court erred in permitting the pleas to be filed on the ground that they had been once tendered and rejected, which action was final as to said pleas, and cites in support of such contention *Wickes* v. *Railroad Co.*, 14 W.Va. 157. This authority refers to a judgment in a case which had become final on the adjournment of court, and not to an order rejecting or filing pleas. An order rejecting a plea is not such a judgment of a court finally adjudicating a case upon its merits as the judgment in the case of *Wickes* v. *Railroad* Co. If a court makes an order filing a plea, it can, at a subsequent term, on motion, strike out such plea as improperly filed; and so, when it has made an order rejecting a plea, the court may, at a subsequent term, allow the same plea to be filed, when it appears that it had been improperly rejected, and should be filed in order to complete the pleadings before trial, imposing such conditions upon the moving party as to costs or continuance as may seem just. But were the three pleas sufficient in law, and should they have been filed? It seems to be well settled by the authorities that the truth of the defamatory matter, if intended to be relied on as a defense, must be pleaded specially; that it cannot be given in evidence under the general issue. Hogg, Pl. & Forms,

§ 244. And such special plea, to be good, must specify the particular facts which show the general charge to be true. *Sweency* v. *Baker*, 13 W. Va. 158; *McClaugherty* v. *Cooper*, 39 W. Va. 317, 19 S. E. 415; Folk, Starkie, Sland. & L. p. 532, note 16; *Warner* v. *Clark*, (La.) 13, South. 203, 21 L. R. A. 502. "Where a defamatory charge is made in general terms, it can only be justified by a specification of the facts which are relied on to establish its truth." *Fry* v. *Bennett*, 5 Sandf. 54,—in which case it is held "that, as the defamatory charges in each libel set forth in the complaint were general, the averments in the answer that the facts stated in each publication were and are true, as a justification, were insufficient." See, also, *Barrows* v. *Carpenter*, 1 Cliff. 204, Fed. Case. No. 1,058; Lovell. Sland. & L. 651. In plea No. 1 the charges in the declaration are simply repeated and declared, to be true. Defendant fails to give any particulars of time, place, or occasion on which plaintiff was egged out of this own county, or what man and wife he parted, or when or where; and so with the other charges set out in said plea No. 1. Under the rules of pleading as laid down by an unbroken line of authorities, plea No. 1 is wholly insufficient.

Plea No. 2 denies that he spoke the words set forth in the declaration as alleged to have been spoken in the presence of L. A. Simons and the others, to wit, on the —— day of ——, 1895, as to the plaintiff being twice egged out of his own county, and that defendant knows this to be a fact, and the other words therein set out; but admits that on the ——, day of ——, 1895, in the presence of Frederick Cutright and others, he did state that parties had told him (to wit, Samuel Ballard and his wife told defendant) the things as set forth in the plea and in the declaration; and denies in the same plea the allegation of the declaration that he made the statements to J. W. Simons, or any other person, on the —— day of——, 1895, as set out in the declaration and plea. The denials in the plea are simply surplusage, as they can only emphasize the general plea of not guilty, which covers all denials of uttering the words charged. Plea No. 2 is sufficient as to such charges as it attempts to justify, and was properly filed.

Plea No. 3 is sufficient to justify the charges of undue

intimacy and association of the plaintiff with women of bad character, and is sufficiently specific as to the charge that "Amos can stand in the pulpit and preach a lie with more grace than any man I ever heard preach," in that he specifies that "in the month of January, 1895, or about that time, the said plaintiff preached a violent, invective, and bitter sermon at Waterloo Church in the county of Upshur, to a large congregation of the best and most respected people in that vicinity, in which he (the plaintiff) used the following language, or words to that effect:

'Mrs. Lucy A. Simons is a credit to any of you women.' 'She is a woman of chastity and virtue, and you are a set of red-tongued liars.' 'I have a thousand dollars to spend in defense of Mrs. Simons and myself, and, if that don't take us through [raising his fists], these will.'—which statements are false. Also, said plaintiff, at Indian Camp Church, in said Upshur county, about February, 1895, while preaching a sermon, stated and declared that one Judge W. G. Bennett told him (plaintiff) that he (plaintiff) had authority and the power as a minister to compel and require any and all persons who attended his services to kneel down, and, upon their refusal or failure to do so, he (the plaintiff) had the right to arrest them, and have them indicted, or words to that effect,—all of which statements were untrue and false." And also the charge of the cruel treatment of his family is sufficiently specified, and the third plea is sufficient.

While the plea No. 1 is in itself insufficient, and should not have been filed, the pleas must be taken together; and, while the second and third pleas cannot cure the first, they cover all the charges, and justify those which are not specifically denied therein, thus rendering No. 1 harmless, unless the defendant should introduce testimony tending to prove and justify charges thereunder not justified either in the second or third pleas. It is true that in *Hopkins* v. *Richardson*, 9 Gratt. 485 (Syl., point 8), it is held that "the admission of an improper plea is error, and the appellate court will not inquire whether the plaintiff could be injured by its admission," and Judge Lee says, in his opinion in the said case; "Nor is it any answer to the objection to say that the pleas, even if bad, could do the plain-

tiffs no harm by being in the record. That is an inquiry upon which the court should scarcely enter. Nor should it speculate upon the effect of an improper plea in prejudice of the plaintiff's rights. If it be insufficient, and no answer to the plaintiff's action, it should be rejected when objected to; nor should the plaintiff be put to an issue upon it." In *Griffie* v. *McCoy*, 8 W. Va. 201, it is held that, when the appellate court clearly sees that one of the immaterial pleas in the trial of the cause (which was submitted to the court in lieu of a jury) must have been considered by the court as being filed, and the matters therein pleaded considered by the court as though it was a good plea, and issue thereon made up, and that said plea and matters therein pleaded must have entered into and affected the judgment of the court to the prejudice of the plaintiff, the appellate court will reverse the judgment for that cause, set aside the finding of the court, and direct a new trial, with leave to perfect the pleadings before said new trial is had. In *Bank* v. *Kimberlands*, 16 W. Va. 555, at page 597, in JUDGE GREEN, writing the opinion of the court, says: "In my judgment, the refusal to reject a plea which the court ought to reject is a good ground for reversal, unless, when all the facts have been certified by the court below, it appears affirmatively to the court that the plaintiff could not be injured by having had to try his case on such improper plea." It would seem that the effect of plea No. 1, alleging, as it does, the truth of all the words complained of, if used by the defendant in the trial, could have no other effect than to prejudice defendant's case, when he could only fail to prove many of the worst charges therein claimed to be true, while it would tend to create sympathy for the plaintiff. Plea No. 1 seeks or attempts to justify every charge alleged in the declaration, yet all those charges which defendant attempts to justify by evidence are sufficiently pleaded in pleas Nos. 2 and 3. The charges that plaintiff was egged out of his own county, and that he parted a man and his wife, and that, "If the Camp boys catch H. B. B. Amos out, it will be worse for him than the egging he got in Braxton county," are all not only specifically denied in the special plea No. 2, as alleged, but they are emphatically denied by the defendant in his

testimony, and no attempt is made by the defendant in the evidence to prove those charges, true, and all the charges which defendant attempts to justify by proof are sufficiently justified by pleas Nos. 2 and 3. In *Hopkins* v. *Richardson*, *supra*, the special plea filed was insufficient to raise the issue it sought to raise, and no other plea was filed which was sufficient to properly raise the issue, and therefore the plaintiff was forced to an issue upon a bad plea; while in the case of *Griffie* v. *McCoy*, just cited, it clearly appears to the appellate court that the improper plea filed had entered into and affected the judgment of the court to the prejudice of the plaintiff. The object of a special plea is to put in issue matters which cannot be proved under the general issue and, when a case is tried before a jury, a bad plea admitted cannot prejudice the plaintiff when no evidence is offered under it. All the allegations of plea No. 1 being sufficiently covered by the general issue and special pleas Nos. 2 and 3, this rendered the filing of plea No. 1 harmless error; and the appellate court will so hold where it clearly appears from the record that no effort was made by the defendant to introduce evidence to prove the truth of charges that were not sufficiently justified in the other special pleas filed, and plaintiff could not have been prejudiced by the filing of said insufficient plea. Appellant, in his brief, says: "Suppose the pleas were good. They were not sustained by the evidence in the cause. * * * It is earnestly insisted that the evidence does not support a single charge that is sought to be justified. There is not a syllable of evidence as to some of them, and as to those the plaintiff was, in any view, entitled to recover, as the court instructed the jury." The defendant, in his testimony, emphatically denies uttering many of the words alleged against him in the declaration, and as to whether he did or not utter them was a question for the jury on the general issue; and as to the evidence touching those charges which are justified under pleas 2 and 3, it is very voluminous and contradictory, nearly six hundred pages of the record being covered by the testimony of about one hundred and thirty witnesses, and no inconsiderable portion of it being for the purpose of impeachment and bolstering up such witnesses as have

gone through the ordeal of attempted impeachment. In all this testimony—which it is the pecular province of the jury to consider and weigh—the preponderance, especially on the charges against the plaintiff of improper intimacy and association with women of bad character, is decidedly with the defendant, and as to all the charges justified by pleas 2 and 3 there is evidence to sustain a verdict.

As to the second assignment of error: The three special pleas were permitted to be filed at the term at which the jury was impaneled. It is claimed by appellant that he was entitled, on the filing of said pleas, to a continuance, at the costs of the defendant, under section 8, chapter 131, Code. The question of continuance generally is one addressed to the sound discretion of the court; but section 8, makes provision for amendments of the pleadings at the trial in case of a variance between the evidence and allegations or recitals, when the court may, if, in its opinion, substantial justice will be promoted thereby, allow the pleading to be amended; and, if it be made to appear that a continuance of the cause is rendered necessary by such amendment, such continuance shall be at the costs of the party making the amendment. This provision is obviously just, as a change in the pleadings after the taking of evidence may be a surprise to the opposite party, and he should have an opportunity to prepare to meet the new phase of the case. Yet he must make it appear that time is necessary for such preparation. In the case at bar these same special pleas had been tendered by the defendant at the previous term, and had been rejected by the court; and it is asserted by counsel for appellee in his brief, and not denied, that the special judge elected to try the case, and who rejected the pleas, stated to counsel in open court that he would permit the introduction of the same evidence under the general issue that he would have permitted under the special pleas so rejected. At the previous term of the court the cause had been continued on the motion of plaintiff, and the court was in position to exercise its sound discretion as to the terms of continuance. "Unless it is plainly apparent that such discretion has been abused, this court will not interfere therewith." *Bank* v. *Hamilton*, 43 W. Va. 75, (27 S. E. 296); *Marmet*

Co. v. *Archibald* 37 W. Va. 778, (17 S. E. 299); *Buster* v. *Holland*, 27 W. Va. 511; *Logie* v. *Black*, 24 W. Va. 21; *Riddle* v. *McGinnis*, 22 W. Va. 253. It does not appear that the filing of the pleas, although at the trial term, comes within the provisions of section 8, chapter 131, Code, as it appears that plaintiff had due notice of the character of testimony that might be introduced, and the record shows that he was prepared to meet it, and was not surprised.

As to the third assignment,—that the verdict was contrary to the law and the evidence,—it is disposed of by what has been said. And, further, that the verdict is manifestly contrary to the instructions given by the court to the jury. Appellant has not discussed this proposition in his brief, and he surely had the benefit of all the instructions he could have desired; and, after patiently listening to and weighing the large mass of testimony, which it took eight or ten days to get before the jury (which appears to have been an intelligent body, and satisfactory to both parties), the jury, with the instructions of the court as to the law in the case still before them and fresh in their minds, and the oath they had taken to well and truly try the issues joined not forgotten,—these twelve "good and lawful men,"—find the issues for the defendant, and that verdict is satisfactory to the judge who presided at the trial, and instructed the jury as to the law of the case under section 2, chapter 103, Code, which says: "All words which, from their usual construction and common acceptance, are construed as insults, and tend to violence and breach of the peace, shall be actionable. No demurrer shall preclude a jury from passing thereon." So it is made by statute the peculiar province of the jury to say whether the words proven to be spoken are insults, and tend to breach of the peace or not. The appellate court has before it the whole record, pleadings, and facts as brought out in the testimony of almost innumerable witnesses; and, unless it appears upon the whole record that the appellant has been prejudiced, the judgment should not be reversed. "The system of appeals is founded upon public policy, and appellate courts will not encourage litigation by reversing judgments for technical, formal, or other error, which the record affirmatively shows could not have prejudiced the

appellant's rights. Where it appears from the record that the error alleged therein on behalf of the appellant could have worked no injury to him, and could not have changed the result, the judgment of the court below will be affirmed." 2 Am. & Eng. Enc. Law, (1st Ed.) 500; *Ball* v. *Cox*, 29 W. Va. 407, (1 S. E. 673;) *Moran* v. *Clark*, 30 W. Va. 358, (4 S. E. 303); *Tully* v. *Despard*, 31 W. Va. 370, (6 S. E. 927). Nearly every state in the Union has held this doctrine. In *Lancaster* v. *Collins*, 115 U. S. 222, 8 Sup. Ct. 33, 29 L. Ed. 373, it is held: "No judgment will be reversed in a court of errors where it is clear the error could not have prejudiced, and did not prejudiced, the rights of the party against whom the ruling was made." And to the same effect the supreme court of the United States has held in many other cases. In *Kennett* v. *Peters*, 54 Kan. 119, 37 Pac. 999, it is held that "a judgment, if shown to be correct by the pleadings and evidence, cannot be disturbed on appeal, notwithstanding errors may have occurred upon the trial." This Court is careful about disturbing the verdict of a jury which has been approved by the trial court, and will not do so unless it is palpably wrong. *Sheff* v. *City of Huntington*, 16 W. Va. 207, (Syl., point 13): "Where a case has been fairly submitted to a jury, and a verdict fairly rendered, it ought not to be interfered with by the court unless manifest wrong and injustice has been done, or unless the verdict is plainly not warranted by the evidence or facts proved." *State* v. *Thompson*, 21 W. Va. 741; *Gwynn* v. *Schwartz*. 32 W. Va. 487, (9 S. E. 880); *Akers* v. *De Witt*, 41 W. Va. 229, (23 S. E. 669); *Gilmer* v. *Sidenstricker*, 42 W. Va. 52, (24 S. E. 566); *Sigler* v. *Beebe*, 44 W. Va. 587, (30 S. E. 76). I conclude that the verdict in the case is sustained by the evidence, and should not be disturbed, and the judgment is affirmed.

Affirmed.

CHARLESTON.

47 127
63 334

KROHN *et al.* v. WEINBERGER *et al.*

Submitted June 21, 1899—Decided November 28, 1899.

1. RECEIVER—*Application—Appointment.*
   Interlocutory applications for a receiver before answer are usually supported by affidavits of the grounds relied upon, and it would ordinarily seem to be sufficient if the facts upon which the application is based are verified by the affidavit of plaintiff alone. (p. 129.)
2. RECEIVER—*Appointment.*
   The appointment of a receiver being for the preservation of the property and the protection of the litigants pending the suit, such appointment gives no advantage to the person at whose instance it is made, nor does it change any title or create any lien. (p. 130.)
3. EQUITY—*Receiver—Case at Rules.*
   In a suit in equity, brought for the purpose of having a receiver appointed, the court, or the judge thereof in vacation, may, upon a proper presentation of facts, appoint a receiver, and direct the sale of property; but while the case is still at rules, and not matured for hearing, the court cannot proceed to enter a decree settling the principles of the cause and distributing the money. (p. 130).

Appeal from circuit court, Wood County.

Bill by Krohn, Fechheimer & Co. against J. Weinberger and others. Decree for plaintiff, and defendant the Hamilton Brown Shoe Company appeals.

Reversed.

J. W. VANDERVORT, for appellant.

V. B. ARCHER, for appellees.

ENGLISH, JUDGE:

J. Weinberger was engaged in the shoe business in the town of Parkersburg, W. Va., and became indebted to several parties and firms that obtained judgments against him, sued out executions, and levied the same upon the stock in said store on the 19th, 20th and 22d of October,

1898, the Hamilton Brown Shoe Company, a corporation, filed an affidavit for an attachment against said Weinberger in the clerk's office of the Wood County circuit court, and obtained an order of attachment, and had the same levied by the sheriff of said county on said stock of goods, but gave no bond, and for that reason possession was not taken by the sheriff. On October 22, 1898, Krohn, Fechheimer & Co. presented their bill in equity to the judge of the circuit court, in which they set forth the facts in regard to the judgments obtained against the defendant, and as to the attachment sued out by appellants and levied upon said merchandise, and alleged that the whole stock was worth two thousand dollars or two thousand five hundred dollars, and charged that there was danger of loss to the creditors, the plaintiffs and defendants, if said property was sold under said executions, and danger of continued conflicts in the liens against said property, and of loss to same, as the constables had no right or authority to invoice said goods, and sell them in bulk, or to distribute the proceeds of sale. The plaintiffs further charge that the only safe way to pursue was to place said stock of goods in the hands of a special receiver, so that the same might have a decree for the amount of their debt, interest, and costs, and that said receiver might be appointed and duly authorized to take possession of said stock, cause the same to be invoiced, and sold in bulk or at retail, as might be deemed best for all concerned; and that the constable Pat Oliver might be enjoined from futher proceedings, etc. Notice having been served on Weienberger of the plaintiffs intention to move in vacation for the appointment of a special receiver, on October 22, 1898, said judge in vacation appointed such receiver for said goods, and authorized him to take possession, and sell in bulk or at retail, as, in his judgment, might be proper, after an inventory had been made by appraisers. He was also directed to dispose of the unexpired term of the lease on the store room occupied by said Weinberger. Bond in the penalty of three thousand dollars was required of said receiver, Zilenziger, before entering upon his duties, and he was required to report his proceedings to the court within thirty days, and said constable was enjoined from further proceedings against said goods. In pursuance of this order, said special receiver gave bond,

took possession of the goods, had them invoiced and appraised (the valuation fixed by the appraisers amounting to two thousand five hundred and fifty-nine dollars and seven cents,) and sold the same in bulk for two thousand seven hundred and six dollars and twenty five cents, and on the 5th of November, 1898, made his report, to the circuit court, which report, by a decree then entered, was ordered to be filed. P. Oliver, constable, tendered in open court his petitions in said case, which was ordered to be filed, and in which was a prayer that the court would direct the special receiver to pay him, two thousand two hundred and ninety-seven dollars and twenty-nine cents out of the proceeds of the sale, being the amount of sundry executions in his hands which he had levied on said stock, and it appearing that said executions amounted to two thousand two hundred and ninety-seven dollars and twenty-nine cents, and that they were liens upon said stock. The defendant shoe company, by counsel, appeared only for the purpose of objecting to a distribution, claiming an attachment against said property to the amount of one thousand three hundred dollars. Thereupon the court, by its decree, held that the receiver should retain in his hands the said sum of one thousand three hundred dollars, to abide the action of the court upon said attachment, and that the residue of said fund should then be distributed. The defendant Weinberger tendered in open court his answer consenting to the distribtuion of said fund. The court then directed the special receiver to pay said constable, P. Oliver, the amount of the executions levied by him on said property, and allowed the receiver to retain out of the money in this hands two hundred dollars for his services, and one hundred dollars for counsel fees. The defendant shoe company, by counsel, appeared at the time this decree was applied for only for the purpose of objecting to the legality of the same: First, because Weinberger was insolvent, and the shoe company had a valid claim against him, which had not been reduced to judgment; second, because said cause was not matured and ready for hearing, and it was illegal to adjudicate the principles of the cause, and distribute the bulk of the fund, before the maturity of the cause, and even before the return of the process. The court overruled this objection, and entered said decree dis-

tributing a large portion of the funds in the hands of the receiver, and the shoe company obtained this appeal.

The first point of error relied on is that the cause was not matured at the time of the decree, the return day of the process not having been reached. Let us first inquire as to the practice in regard to application for receivers. In *Ruffner* v. *Mairs*, 33 W. Va. 655, (11 S. E. 5), this Court held that "a court of equity should exercise extreme caution in the appointment of receivers on *ex parte* applications, and be careful that a proper case is presented before adopting this extraordinary procedure." High, Rec. § 107, says: "Interlocutory applications for a receiver before answer are usually supported by affidavits of the grounds relied upon, and it would ordinarily seem to be sufficient if the facts upon which the application is based are verified by the affidavit of plaintiff alone;" citing *Jones* v. *Dougherty*, 10 Ga. 273. Barton in his Chancery Practice (volume 1, p. 515)., says: "The immediate moving cause for the appointment of a receiver is that the subject of litigation may be preserved, or the rents and profits of it kept from waste, loss, or destruction, so that there may be some harvest—some fruit—to gather after the labors of the controversy are over." And on page 522 he says: "The appointment of a receiver being for the preservation of the property and the protection of the litigants pending the suit, such appointment gives no advantage to the person at whose instance it is made; nor does it change any title, or create any lien." The facts relied on in the case at bar are that the property owned by defendant consisted of a stock of goods, which had been levied on under numerous small judgments, and that, if the property was sold at public auction at constables' sale, it would result in great loss in the proceeds arising from such sale; that the constable had no authority to invoice said goods, and sell them in bulk, which could only be done by a receiver; and that the goods would be dissipated by contests in regard to conflicting claims. The receiver was required to give ample bond before proceeding to perform his duties for the protection of all parties concerned; and, in my view of the facts presented, the court was warranted in appointing such receiver to take charge of and sell the property as provided. I cannot see that the appellant was prejudiced

by said decree, nor do I understand this decree as prejudicial to the rights of appellant. Counsel for appellant insist, however, that the decree directing the distribution of a large portion of the proceeds of said sale was premature and unauthorized. Now, the principles controling the appointment of a receiver are very like those governing the granting or refusing injunctions. They are each brought into requisition when it is desirable to preserve property until conflicting claims and rights are determined. High, Rec. § 100, says: "As regards the form of an order appointing a receiver and authorizing him to sell the property in controversy, it would seem to be the better practice not to include in such order a direction as to applying the proceeds of the sale, since this is a matter for adjustment after a final decree settling the rights of all parties in interest." So, in the case of *Fadley* v. *Tomlinsou*, 41 W. Va. 606, (24 S. E. 645), (an injunction case), this court held that: "In such case, while at rules, and not maturing for hearing, the court, having overruled defendant's motion to dissolve the injunction, cannot proceed to enter a decree settling the principles of the cause." When the records and briefs of counsel are looked to, it is at once apparent that there are conflicting claims which remain undetermined. Counsel for appellant assert that he has a valid attachment lien upon the property, while counsel for the plaintiff as confidently claim that the affidavit on which said attachment issued does not conform to the statute, and for that reason no lien was thereby acquired. This order went into the hands of the sheriff on the 17th day of October, and it must be presumed the sheriff performed his duty by levying it on the same day. Most of the executions seem to have been levied on the 19th and 20th of the same month, so that the priority and validity of these conflicting liens remain unsettled. Such being the case, and the plaintiff's suit not having been properly matured for hearing, following the ruling of this court in *Fadley* v. *Tomlinson*, *supra*, I hold that the circuit court erred in settling the principles of the cause and distributing a large portion of the money before the case was regularly matured. The decree must be reversed, and the cause remanded.

Reversed.

CHARLESTON.

WINIFREDE COAL CO. *et al. v.* BOARD OF EDUCATION OF CABIN CREEK DIST. *et al.*

Submitted June 22, 1899—Decided November 28, 1899.

1. SCHOOL LEVY—*Equity Jurisdiction.*
   A court of equity has jurisdiction to restrain by injunction the collection of an illegal levy upon the property of a school district, made by the board of education, in a suit brought by and on behalf of the resident taxpayers of such district. (p. 135).
2. SCHOOL LEVY—*School Books—Building Fund.*
   The levy by the board of education to pay for school books must be made annually, and must be paid out of the building fund. (p. 137).
3. SCHOOL LEVY—*Valuation.*
   The fact that the levy of forty cents on the one hundred dollars valuation for building fund and fifty cents thereon for teachers' fund is not sufficient to pay any existing indebtedness of the district in addition to the other purposes for which it is levied, is not a condition precedent to the authority of the board to exceed said rates in laying such levy, since the statutes provide other contingencies, which authorize the board to levy in excess of said rates or to lay a special levy. (137- 138).
4. EQUITY PLEADING—*School Levy.*
   In a bill of this character it is not sufficient to allege in general terms that at the time the levy was laid there was no legal existing indebtedness against the board of education created in any manner authorized by law, but facts must be alleged to show the illegality of the levy. (138).

Appeal from Circuit Court, Kanawha County.

Bill by the Winifrede Coal Company and others against the board of education of Cabin Creek district and others. Decree for plaintiffs and defendants appeal.

Reversed.

W. S. LAIDLEY, FLOURNOY, PRICE AND SMITH, and CHILTON, MACCORKLE & CHILTON, for appellants.

GEORGE W. PATTON and BROWN, JACKSON & KNIGHT, for appellees.

ENGLISH, JUDGE:

The board of education for Cabin Creek district, at its meeting held in July, 1898, made a regular levy of thirty-five cents on every one hundred dollars valuation of the property in said district for the building fund, and of ninety cents on every one hundred dollars for the teachers' fund, and, in addition thereto, the said board, at the same meeting, laid a special levy of twenty-five cents on every one hundred dollars valuation of the property taxable in said district, which was designated as a "special building fund." At the time said levies were made it is claimed there was no legal indebtedness due, owning or payable by said board; but the voters of said district, pursuant to section 41 of chapter 45 of the Code, had authorized said board to continue the free schools of said district for seven months in the year. The levies so made had been extended upon the tax books of said district, and the books containing the same had been delivered to J. H. Copenhaver, sheriff of Kanawha County, who was proceeding to collect said levies, and threatening to compel the taxpayers of said district to pay their respective taxes at the rates aforesaid by distraining therefor, when, on the 17th of December, 1898, the Winifrede Coal Company and others, who sued on behalf of themselves and all other taxpayers of Cabin Creek district, filed their bill in equity in the circuit court of Kanawha County, alleging the above-mentioned facts, with others, and praying that the court would restrain, inhibit and enjoin said Sheriff Copenhaver from collecting said special building tax of twenty-five cents on the one hundred dollars valuation, which was levied by said board at its meeting in July, 1898, and from collecting said levy for the teachers' fund of ninety cents on each one hundred dollars valuation, or, if not the whole of the levy for the teachers' fund, that it would restrain, inhibit, and enjoin the said sheriff from collecting more than fifty cents on each one hundred dollars valuation for teachers' purposes for said year from the plaintiffs and from all the other taxpayers in said district, and also from levying on or selling any of the property of said plaintiffs for said specific tax, and from paying any of the taxes which he had collected or might collect on account of said building fund of said district upon alleged

or pretended indebtedness of the said board which arose or is claimed to have arisen out of contracts or transactions with said board prior to the making of said levy; and that said board and the president and commissioners thereof might be restrained and enjoined from making any allowance, or issuing any orders, or taking any other actions towards the payment of any such alleged indebtedness; and that the levy for said special building tax made by said board at its July meeting might be declared to be illegal, null, and void, and that its levy of ninety cents for teachers' purposes, made at said meeting, might be declared illegal, null, and void, or, if not to the whole, at least as to forty cents thereof; and that any pretended indebtedness which might have been attempted to be created by said board without the authority of law, and in the manner prescribed by law, might also be declared illegal, null, and void. On February 17, 1899, the defendants to said bill, the board of education of Cabin Creek district, William H. Edwards, Adam Schlegel, and D. M. Jarrett, demurred to the plaintiffs' bill, which demurrer was set down for argument, and was overruled, and thereupon the defendants tendered their answers to plaintiffs' bill, which were excepted to, and the exceptions overruled by the court, and the answers ordered to be filed. The plaintiffs also demurred to said answers, which demurrers were overruled, and the plaintiffs replied generally, and the defendants moved the court to dissolve the injunction awarded the plaintiffs in the cause, which motion was overruled by the court. Thereupon the defendants moved the court to require of the plaintiffs a bond in the penalty of ten thousand dollars, conditioned for the payment of all such costs or damages as should be sustained by the defendants, or either of them, or any other person, in case the injunction be dissolved; which motion the court overruled, but ordered that the plaintiffs give a new injunction bond before the court in the penalty of five hundred dollars. From this decree, the board of education obtained this appeal.

While it is true the action of the court in overruling the defendants' demurrer to plaintiffs' bill is not assigned as one of the errors relied upon in the petition for an appeal, yet counsel for the appellants, in their brief, insist that the

court erred in overruling said demurrer. It is contended that heretofore the courts have been averse to the equitable interference with the taxing power in the ordinary process of the collection of the revenue, and in order to justify such interference the case must be made one of absolute necessity before the same would be granted. We do not understand such to have been the tendency of the ruling of this court or of the Virginia court of appeals in considering this question. The jurisdiction of equity in matters of this kind has been held to be accumulative, and equity has been regarded the proper forum in all cases where the remedy at law was not plain, complete, and adequate. In *Bull* v. *Read*, 13 Gratt. 78,—a case in which a levy had been made for school purposes, and a bill had been filed to enjoin the collection of the taxes on the ground that it was illegally levied,—the jurisdiction of equity was sustained. Judge Lee, in delivering the opinion of the court, said: "It may be that for each act of the board of commissioners affecting the inhabitants of the district every one who is aggrieved might have a remedy at law of some sort, more or less effectual, but the remedy in equity would be far more perfect, adequate and complete; and as the acts of the commissioners would be in their nature continuing, and to be renewed from time to time, to restrict the parties to their legal remedies would be to consign them to interminable litigation, and involve endless multiplicity of suits. Hence the court of chancery will interpose by its injunction to prevent the threatened wrong, and provide a remedy which shall at once reach the whole mischief, and secure the rights of all both for the present and the future; and its jurisdiction in such cases would seem to be well defined and fully sustained by authority,"—citing numerous authorities. This portion of Judge Lee's opinion is referred to and quoted with approval by JOHNSON, J., in the case of *Corrothers* v. *Board*, reported in 16 W. Va. 541, which was a case in many respects similar to the one at bar, and in which the jurisdiction of equity was maintained, the Court holding in the first, second, and third points of the syllabus as follows: "(1) A suit in equity will not lie to restrain the collection of a tax on the sole ground that the tax is illegal. There must exist, in addition, special circumstances bringing the case under some recognized

head of equity, such as that the enforcement of the tax would lead to a multiplicity of suits," etc. "(2) Where the case is thus brought under some recognized head of equity jurisdiction,—as where the plaintiff brings the suit in behalf of himself and all other taxpayers in the district who are to suffer by the tax imposed,—if the bill shows that the tax is illegal, to avoid a multiplicity of suits, equity will take jurisdiction by injunction. (3) Where equity has jurisdiction of a subject, and the legislature, by statute, gives a remedy at law for the injury complained of, and does not, by the terms of said statute, take away the equitable jurisdiction, it must be considered as an additional remedy; and the equitable jurisdiction is not thereby ousted." See said case, and the authorities therein cited; also, *Christie* v. *Malden*, 23 W. Va. 667 (Syl., point 2). Now, it is true our statute (Code, page 1062) provides a mode for superseding an illegal or erroneous levy upon the petition of ten taxpayers, etc. This statute does not, however, by its terms, take away equity jurisdiction; and, following the ruling in *Corrothers* v. *Board*, *supra* we must consider the statutory remedy as merely cumulative, and hold that the circuit court committed no error in overruling the defendant's demurrer. It is also true that this court, in *Wells* v. *Board*, 20 W. Va. 157, recognized the fact that an illegal levy made by a board of education might be superseded, under chapter 72, page 153, Acts 1875, by pursuing the mode therein prescribed; but the ruling in that case by no means contravenes or antagonizes the ruling in the case of *Corrothers* v. *Board*, *supra*, because said statute does not, by its terms, take away the equitable jurisdiction, and a party wishing to supersede the levy as illegal may elect his forum. As a matter of course, the facts properly pleaded in the bill must be taken as true in considering the demurrer. This being the case, let us inquire whether the plaintiffs' bill entitles them to the relief sought. They allege that they are informed, believe, and charge that on the first Monday in July, 1898, there was no legal existing indebtedness due, owing, or payable by said board, and no such indebtedness has been incurred or created in any manner authorized by law, and at that time there was no lawful debt against said board, and that, notwithstanding these facts, in July, 1898,

said board made the levies before stated. Referring to the statutes, we find that section 38 of chapter 45 of the Code limits the levy for building fund to forty cents on the one hundred dollars valuation. Section 40, same chapter, provides that the levy to support the primary free schools, which is known as the "teachers' fund," shall not exceed the rate of fifty cents on the one hundred dollars valuation, yet the latter portion of section 40 provides that: "If the levy provided for in this and the 38th shall not be sufficient to pay any existing indebtedness of the district in addition to the other purposes for which it is levied, the board may increase such levy to the amount actually necessary or lay a special levy for the purpose." Section 41 provides for the submission to the voters of the district the question as to whether the schools therein shall be continued more than four months (which, by a subsequent statute, reads five months), and, if the proposition for a longer term receives a majority of the votes cast, then the board may order the levy accordingly. The allegation above quoted from the plaintiffs' bill seems to be predicated upon the supposition that the board would only be warranted in levying more than forty cents on the one hundred dollars for the building fund and fifty cents on the one hundred dollars for the teachers' fund when it was necessary in addition to the other purposes, while, as we have seen, if the voters of the district vote in favor of more than five months' school, the board may levy accordingly. The error into which the pleader has evidently been led in his bill is in presuming the rates of forty cents for building fund and fifty cents for teachers' fund cannot be exceeded unless it be to pay existing lawful indebtedness of the district in addition to other purposes for which it is levied. Another instance in which forty cents on the one hundred dollars valuation for building fund may be exceeded is found in section 15, chapter 62, of the Acts of 1897, where it is provided that "the board of education shall pay the costs of such books and the amount of charges for transportation out of the building fund of the district, and shall lay an annual levy for the same upon the taxable property of the district in the manner and at the time that other levies are laid for said fund." This serves to show that the existence of prior lawful indebtedness is not a condition pre-

cedent to the right to exceed the rates of forty cents for building fund or fifty cents for teachers' fund. Under said section 15, chapter 62, I do not understand that the levy therein provided for can only be applied in payment for books purchased before the levy is made. It merely provides a fund for the payment of books furnished to the depositaries; and we must presume the board, in levying twenty-five cents on the one hundred dollars valuation, performed the duty required of it by statute. The plaintiffs, in their bill, content themselves with alleging that at the time said levy was made there was no lawful debt against said board. We say, however, that allegation may be true, and yet the plaintiffs not be entitled to the relief prayed for. If the levy was illegal, the plaintiffs, in their bill, must point out in what respect the illegality consists. The defendants are entitled to this to enable them to make proper defense.

The plaintiffs further allege and charge that said board of education had certain transactions and made certain pretended agreements and contracts with school furniture and book companies or firms but are not informed as to the companies or firms with which such contracts were made, or of the facts necessary to enable them to set out such alleged contracts, but say it has been done without lawful authority, and in violation of the Constitution; and thus fails to point out in what the alleged illegality consists. See *Armstrong* v. *County Court*, 41 W. Va. 602, (24 S. E. 993). Sands, in History of a Suit in Equity (page 11, §17), says: "The bill must show sufficient matters of fact *per se* to maintain the case, and, if it be defective in this, the bill will be dismissed;" citing Mitf. Eq. Pl. 125. As to the allegation that they were not informed as to the parties with whom such contracts were made, they might easily have ascertained these facts from the records of the board of education, and such firms or persons were necessary parties to the bill. The general rule laid down in 1 Bart. Ch. Prac. p. 141, is that "all persons interested in the subject-matter of the bill, and which is involved in and to be affected by the proceedings and result of the suit should be made parties," etc. The parties who sold the books to this board of education are directly interested in the result of this suit, which seeks to enjoin the payment

of their claims. In my view of the whole case presented, the circuit court erred in overruling both the demurrer to plaintiffs' bill, and the motion to dissolve the injunction. The injunction is dissolved, the demurrer sustained, and the cause remanded, with leave to amend the bill if the plaintiffs deem proper.

Reversed.

47 139
61 285

CHARLESTON.

BOGGESS *et al.* v. GOFF.

Submitted June 10, 1899—Decided November 28, 1899.

1. INTEREST—*Partial Payments.*

The holder of five notes given for the purchase of land, all dated the same day, and payable as annual installments, bearing interest from their date, and it being stated in the notes, "said interest to be paid annually," receiving partial payments thereon, without any directions from the debtor as to the application of such payments, may apply the same, first, to the payment of the interest on any or all of such notes which may be due at the time of the payment, and then to the principal of such of the notes as may be due. (p. 147).

2. INTEREST—*Compound Interest.*

But in no event, in the absence of a contract with the debtor to that effect, made after such interest becomes due, shall the holder charge interest upon such interest. (p. 147).

Appeal from Circuit Court Harrison County.

Bill by Sarah Boggess and D. W. Boggess against Mary R. Goff. Decree for complainants, and they appeal.

Modified.

E. G. SMITH, for appellants.

MARCELLUS M. THOMPSON, AND JOHN BASSELL, for appellee.

MCWHORTER, JUDGE:

J. W. Lynch and his wife, Agnes V., on the 27th day of October, 1879, conveyed, by deed of that date, to Sarah Boggess a tract of two hundred and thirty-five acres of land in Harrison County, in consideration of ten thousand six hundred and eighteen dollars and forty-seven cents, of which two thousand dollars was to be paid on the 1st day of December, 1879, and the residue payable in six equal annual installments of one thousand four hundred and thirty-six dollars and forty-one cents, from the said 1st day of December, 1879, and to draw interest from that day, said interest to be paid annually, and for all of which seven payments, the said Sarah Boggess made her notes under seal, also signed by D. W. Boggess, dated October 28, 1879, and retained the vendor's lien upon the land conveyed to secure the payment thereof. The first two of said notes were paid. The five remaining notes are all precisely alike, and read as follows: "One thousand four hundred and thirty-six dollars and forty-one cents. On or before the 1st day of December, 188—, for value received, I promise and bind myself, my heirs and assigns, to pay to Josiah W. Lynch the just and full sum of one thousand four hundred and thirty-six dollars and forty-one cents (one thousand four hundred and thirty-six dollars and forty-one cents), with interest from the 1st day of December, 1879, said interest to be paid annually; it being a partial payment for land bought of him. Witness my hand and seal on this 28th day of October, 1879. Sarah Boggess. [Seal.] D. W. Boggess. [Seal.] Teste: C. E. Stonestreet." The said five notes were assigned by Lynch, the payee, to Nathan Goff, and by the executor of said assignee to Mary R. Goff. Payments were made thereon by the makers of said notes from time to time, when on a final settlement on the 15th day of September, 1896, between the said D. W. Boggess, acting for his wife, Sarah Boggess and Mary R. Goff, said Boggess paid said Goff two thousand dollars, and made his note payable to said Mary R. Goff for the sum of seven hundred and nineteen dollars and eighty cents, as the balance due on account of said transaction. At the November rules, 1896, Sarah Boggess and D. W. Boggess filed their bill in the clerk's office of the circuit

court of Harrison County against said Mary R. Goff, to which the defendant appeared and demurred; and at the February term, 1897, of said court, plaintiffs tendered their amended bill in open court, and the same, was filed, and the defendant by counsel, demurred to said amended bill, and the same, being argued, was overruled, and the defendant ordered to answer within ten days. The bill set up the conveyance of the land by Lynch to Sarah Boggess; the execution and assignment of the notes as stated; alleging that all of said notes had been paid in full, including lawful interest, and had been overpaid by plaintiffs; and alleging that payments had been made thereon from time to time, and that defendant had applied said payments to the interest on the several notes, and had computed interest on interest thereon, by which means she had been largely overpaid on each of said notes, so that at the time of the final settlement, on the 15th of September, 1896, according to her computation of the interest, plaintiffs owed defendant, after paying at that date two thousand dollars, the sum of seven hundred and nineteen dollars and eighty cents, for which amount said D. W. Boggess made his note, payable to defendant; that plaintiffs had great confidence in defendant, and relied entirely on her to keep the account and compute the interest, and did not know that they had been paying interest on interest until after the said last mentioned note was given, and alleging that, in paying the two thousand dollars on said date, he overpaid the balance of the whole debt, in cash, three hundred and seventy-one dollars and fifty-six cents, besides the said note of seven hundred and nineteen dollars and eighty cents; that plaintiffs were not skilled in mathematical calculations of interest, principal, and partial payments, were not accustomed to making such calculations, and were, in fact, unable to make them, and hence did not know they were paying compound interest until after such payments were made; that they never ratified said payments; that they paid the residue of three hundred and seventy-one dollars and fifty-six cents, and gave the note aforesaid, under coercion, by mistake, and involuntarily so overpaid the defendant; and prayed that defendant be required to refund to plaintiffs the said sum of three hundred and seventy-one

dollars and fifty-six cents, and that the said note for seven hundred and nineteen dollars and eighty cents be declared usurious, fraudulent, and opposed to public policy, and that the same be canceled, and be declared null and void, and delivered up to D. W. Boggess, and for general relief.

On the 5th of February, 1897, the defendant tendered her answer, to the filing of which plaintiffs objected, but stated no ground of objection or exception to the answer. The objection was overruled, and the answer filed, to which plaintiffs replied generally, which answer admitted the transaction with Lynch, the assignment of the five notes, and avers that all payments made upon the said land, except the cash payment of two thousand dollars, which were made prior to January 4, 1896, were made either to Nathan Goff, Sr., or to his executor, and as to all payments made before respondent became the owner of said obligations by assignment, and as to all payments made thereafter to her, the payments were made, and the calculations or computations were made, with reference to the payment of interest annually, and not for the payment of money from time to time, and the application thereof according to the rules of partial payments upon debts when the interest and principle were payable at the maturity of the debt, and not payable annually, as upon the notes in question; that the payments were not made at stated or regular intervals, but just as the plaintiffs could pay or felt disposed to make payments, but the payments were always made with the distinct understanding that the interest was to be annually computed; that unpaid interest was to bear interest; denies that the payments made overpaid the notes, denies that the plaintiffs were coerced on the 15th of September, 1896, to pay the two thousand dollars, or to give the note for seven hundred and twenty dollars as a further payment; and avers that said two thousand dollars was paid, and the note for seven hundred and twenty dollars (not seven hundred and nineteen dollars and eighty cents as they state) was given, by plaintiffs voluntarily, without any constraint or coercion on the part of respondent, and with full knowledge on their part of all the facts, after statements had been sent them from time to time by respondent showing that interest was computed on the basis fixed by the obligations them-

selves and by the terms of the deed from Lynch, and the allegation that they never agreed to pay interest upon interest is untrue; denies that plaintiff D. W. Boggess was ignorant and unskillful in mathematics, so as not to comprehend the statements and calculations of interest made by respondent, or for her, and sent him; and avers that said Boggess wrote letters acknowledging receipt of such statements, and thanked respondent for her indulgence to him and his co-plaintiff in not pushing them and urging payment, etc.

The deposition of D. W. Boggess was taken on behalf of plaintiffs, who stated that he transacted all the business for his co-plaintiff, his wife, as her agent, and that she knew nothing personally about the transaction. On behalf of defendant, her own deposition and that of Lee Haymond were taken and filed in the cause.

On the 9th day of October, 1897, the cause came on to be heard; "whereupon, it appearing to the court that the first one to fall due of the notes in controversy in this cause is not entitled to consideration by the court, and it further appearing that the calculations concerning the remaining next three notes are long and tedious and somewhat involved, it is therefore adjudged, ordered, and decreed that this cause be referred to Harvey W. Harmer, a master commisioner of this court, to make a calculation of said three last-named notes, falling due on the 1st day of December, 1882, 1883, and 1884, respectively, by calculating these three notes and interest thereon according to the face of said notes, subject to the credits thereon indorsed, and that he calculate the note falling due December 1,1885, according to the annual method, without any interest on accrued interest, and to calculate any or all of said four notes, or all the notes in this cause, by any method which either party of this suit may require, and report the same to the court."

The commissioner filed his report, first showing calculation of note falling due December 1, 1882, calculating interest upon annual interest after it became due until paid, and applying payments thereon from time to time, showing a balance due on this note, November 17, 1891, of fourteen dollars and seventy-six cents. He calculated the next note, falling due December 1, 1883, in the same

way, showing its overpayment on January 23, 1894, by fourteen dollars and fifty cents. A like calculation of note falling due December 1, 1884, showed an overpayment of eighteen dollars and sixty-five cents, December 4, 1894; and on the note falling due December 1, 1885, he calculated according to the "usual method," or United States partial-payment rule, showing amount due on said note September 15, 1896, to be two thousand three hundred and twenty-three dollars and thirty-five cents; and by request of counsel for plaintiffs, he calculated the note falling due December 1, 1881, in the same manner the court directed him to calculate the three falling due in 1882, 1883, and 1884, respectively, which showed a balance due on said note on August 12, 1882, of three cents; and by request of plaintiffs, he also united into one sum the five notes falling due in 1881, 1882, 1883, 1884, and 1885, and calculated the same according to the "usual method," or United States partial payment rule, which shows a balance due defendant on the 15th of September of two thousand, four hundred and twenty-one dollars and forty-seven cents; and, by request of plaintiffs, he also calculated the notes falling due December 1, 1881, 1882, 1883 and 1884, respectively, according to the "usual method," or the United States partial-payment rule, counting each separately, which calculation showed the first note overpaid August 12, 1882, by nine dollars and forty-two cents, the next note overpaid November 17, 1891, by one hundred and twelve dollars and sixty cents, the third note overpaid July 23, 1894, two hundred and twenty-eight dollars and nine cents, and the fourth overpaid December 4, 1894, two hundred and fifty-nine dollars and forty-four cents. The commissioner then calculated the note falling due December 1, 1883, in the ordinary way of computing interest and applying partial payments, computing interest from December 1, 1879, to October 28, 1893, calling it fourteen years, ten months, and twenty-seven days, and showing an overpayment of said note, January 23, 1894, of one hundred and forty dollars and sixty cents, and a like calculation of the note falling due December 1, 1884, showing an overpayment thereof of one hundred and seventy dollars and twenty cents, and on December 4, 1894; to which report plaintiffs filed their exceptions, that the commissioner erred in his

calculations of all the notes, respectively, in that he allowed interest upon interest unlawfully, and that, in the calculation of all of said notes as a whole, said commissioner erred, in that he allowed illegal interest upon interest; and a fourth exception as to errors in time of calculating the interest on some of the notes, some of which errors are patent on the face of the report, which occurred in the calculation made on the notes separately, at the request of plaintiffs' counsel, which calculations are made according to the "usual method," or the United States partial-payment rule; and a further exception, "because said calculations, except the one note in plaintiffs' fourth exception, are made upon a wrong basis, and by the application of principles which do not obtain in this case under the law," and because said commmissioner should have reported a calculation of all and each of said notes, as required by plaintiffs, according to the rule laid down in *Hurs't Adm'r* v. *Hite*, 20 W. Va. 183. It appears also from the final decree in the cause that the defendant also excepted to said report, but such exceptions do not appear in the record. On the 31st day of January, 1898, the cause was heard, and the court overruled all the plaintiffs' exceptions to the commissioner's report, excepting the third exception, which goes to the calculation of all of said notes as whole, which exception was sustained, and overruled all exceptions of the defendant, and in all other respects confirmed the report. It was recited that it appeared from the report that the note falling due November 17, 1891, was not paid by fourteen dollars and seventy-seven cent which amounted, on the 14th of September, 1896, to eighteen dollars and ninety-seven cents; that the note falling due December 1, 1893, was over paid by fourteen dollars and fifty cents, which amounted, on September 15, 1896, to sixteen dollars and twenty-five cents; and that the note falling due December 1, 1884, was overpaid by eighteen dollars and sixty-five cents which amounted, on September 15, 1896, to twenty dollars and fifty-four cents—making the total of two overpayments thirty-six dollars and eighty-nine cents, which leaves, after deducting said unpaid balance of eighteen dollars and ninety-seven cents, an overpayment on said three notes of seventeen dollars and ninety-two cents, as of September 15, 1896; and that it further ap-

peared from said report that the note falling due December 1, 1885, amounted, on September 15, 1896, to two thousand, three hundred and twenty- three dollars and thirty-five cents, from which should be deducted the overpayment of seventeen dollars and ninety-two cents and payment of two thousand dollars, which leaves a balance as of that date due from plaintiffs to defendant of three hundred and five dollars and forty-three cents; and the same was decreed, with interest to defendant to January 31, 1898 (date of decree), making the sum of three hundred and twenty-seven dollars and fifty cents as of that date, with interest from the said 31st day of January, 1898, until paid; and it was further decreed that the note of plaintiff D. W. Boggess for seven hundred and twenty dollars, in controversy, should be canceled and delivered up by the defendant to plaintiffs on the payment of said amount decreed to defendant, and that defendant pay plaintiffs their costs of the suit. From this decree plaintiffs appealed to this court.

Appellants seem to rely very strongly upon the case of *Genin* v. *Ingersoll*, 11 W. Va. 549. The notes given in that case by Ingersoll were almost in the exact language of the notes in controversy in case at bar, annual payments running through a series of years, bearing interest from the same date, which interest was to be paid annually. The only difference, if any, is that in the *Genin-Ingersoll Case*, a mortgage was given to secure the notes, and in said mortgage there was a clause describing the notes as bearing interest "from the 2d day of February, 1854, at the rate of six per cent. per annum, payable annually; that is to say, on the 2nd day of February in each of the next seven years. The interest on all the principal then unpaid is to be paid; * * * all of which said purchase money and interest the said Josiah hereby agrees and binds himself, his heirs," etc., "to pay to the said Thomas H. Genin, or his assigns, at the respective times aforesaid." It is there held that, under the terms of the mortgage, the several notes must be regarded as one debt, on which the interest was payable annually, and the payments should first have been applied to the payment of the interest due on the whole debt, and then to the discharge of the notes in their order. The notes themselves contain a provision that the interest

thereon is payable annually. This provision carries with it a cause of action for the interest at the end of each year, in case it is not paid according to the contract, "but, neglecting to bring his action, he might be considered as waiving his claim to compound interest." *Hastings* v. *Wiswall*, 8 Mass. 455. In *Bowman* v. *Duling*, 39 W. Va. 619, (20 S. E. 567) (Syl., point 1): "It is not error to decree for the payment of annual interest due on deferred installments of purchase money in accordance with the contract of purchase." The provision for the payment of interest annually in this case is identical with the case at bar. The holder of these notes in the case at bar was as much entitled to have the interest paid on them at the end of each year as to have the principal paid when it fell due, and it was as much the duty of the makers of the notes to pay the interest on the notes according to their contract as to pay the principal when it should fall due; and the holder of the notes, on receiving partial payments on account of such notes, in the absence of directions of the debtor as to the application thereof, would have the right to apply same either on the principal or on overdue interest, as she chose. *Railroad Co.* v. *Thornburg*, 1 W. Va. 261. But she had no right to apply it to the overdue interest, with interest thereon added, as she admits she did; but claims in her testimony that, in making the settlements she made statements to plaintiff D. W. Boggess showing clearly how the application of the payments was made, and that he understood and acquiesced therein. This, however, he denies, and claims that he did not know that he had been paying interest on interest until after giving the final note for balance of seven hundred and nineteen dollars and eighty cents. "When no appropriation has been made by either debtor or creditor of a payment, the court will apply the same according to the principles of justice and equity in the particular case." *Norris* v. *Beaty*, 6 W. Va. 477. Plaintiffs do not claim that when they made payments on the notes they gave any directions as to the application of such payments. The defendant undertook to apply the payments according to the contract contained in the notes, as she construed it, which would give her interest upon interest. There can be no question as to her right to have applied such payments, first, to the overdue interest, and then to the principal of

such notes as had fallen due. And this is the application which the court should have made according to the third statement made by the commissioner, Harmer, where he makes the calculation at the request of the plaintiffs, treating all the notes as one debt, and applying the partial payments thereon.

Plaintiffs' exceptions to the commissioner's report should have been sustained, except, perhaps, the third, which related to the calculation of the five notes as a whole debt. While the report contained a small amount of interest on interest, in calculating up to three payments made, —seven hundred dollars paid July 10th, five hundred dollars paid July 26th, and four hundred and fourteen dollars and seventeen cents paid August 12th, all in 1882,—and for that reason and to that extent the report was subject to the plaintiffs' exception, yet the commissioner's calculation on the said notes, as a whole, was not to the prejudice of the plaintiffs. If he had calculated strictly according to the rule laid down in *Genin* v. *Ingersoll*, that "the payments made should first have been applied to the payment of the interest due on the whole debt, then to the discharge of the notes in their order," the interest on the interest which was included in the 'calculation would have been more than overcome by the calculations of interest on the overdue notes to be discharged by the partial payments. The appellee makes a cross assignment of error, in that the court adopted an improper mode of calculation, and claims that calculation as correct which the commissioner made at the instance of the plaintiffs, which was based on all the notes together. The amount ascertained by the commissioner to be due upon the 15th day of September, 1896, according to the calculation, when he groups all the notes as one debt, and applies the usual rules of partial payments, was the sum of four hundred and twenty-one dollars and forty-seven cents, after the application of the two thousand dollars paid on that day. The court erred in the mode of calculation of interest and should have decreed to the defendant at least the said sum of four hundred and twenty-one dollars and forty-seven cents so ascertained by the commissioner as of September, 15, 1896, upon the cancellation and surrender of the note for seven

hundred and nineteen dollars and eighty cents (or seven hundred and twenty dollars).

Appellee contends that appellants are not entitled to be entertained in this court for the reason that after the decree was entered they collected and received the costs from the appellee for which they had a decree; that, having accepted the terms of the decree by receiving the costs, therefore the appeal should be dismissed; and cite *Hall* v. *Hrabrowski*, 9 Ala. 278, and *U. S.* v. *Dashiel*, 3 Wall. 688, 18 L. Ed. 268. On examination of those authorities, it is found that they cannot apply to case at bar. In the Alabama case, a plaintiff who had received a judgment below with which he was not satisfied, sued out a writ of error, seeking to reverse it, and, while the cause was pending in the appellate court, he sued out execution on his judgment, and collected the money, and, the fact not being brought to the notice of the appellate court until after its judgment had been pronounced, reversing and remanding the cause, an order was made directing that the mandate should not issue until the debt, interest, and costs below were refunded to the defendant. In this case it is conceded that the plaintiffs were entitled to relief, from the fact that a decree was entered canceling the note for seven hundred and nineteen dollars and eighty cents, and requiring its surrender, and no complaint of the decree on that account is made by appellee, and plaintiffs would be entitled to the costs of this suit in the circuit court. In the said case of *U. S.* v. *Dashiel*, plaintiff, previous to taking its writ of error, sued out execution below, and got a partial, but not a complete, satisfaction on its judgment. It was held that the writ of error would not in consequence of such execution merely, be dismissed.

For the reasons herein stated, the decree of the circuit court is reversed and set aside, and, this court proceeding to render such decree as the circuit court should have rendered, it is adjudged, ordered, and decreed that Sarah Boggess, and Harvey H. Boggess, as administrator of the estate of D. W. Boggess, deceased, out of the assets in his hands, do pay to the defendant, Mary R. Goff, the said sum of four hundred and twenty-one dollars and forty-seven cents, with interest thereon from the 15th day of September, 1896, until the 31st day of January, 1898,

amounting to four hundred and fifty-six dollars and thirty-one cents, with interest thereon from January 31, 1898, until paid, and that said defendant cancel and surrender to the plaintiffs the said note for seven hundred and nineteen dollars and eighty cents (or seven hundred and twenty dollars), and the defendant pay to plaintiffs their costs of suit in the circuit court, if not already paid; and permission is given the defendant, Mary R. Goff, to sue out execution on this decree against said Sarah Boggess and said administrator of the estate of D. W. Boggess deceased. Appellants to pay the costs of this appeal, the appellee substantially prevailing.

Modified.

CHARLESTON.

McCLUNG *v.* McWHORTER.

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Submitted June 23, 1899—Decided November 28, 1899.

PROCESS—*Officers—Return—When prima facie.*

An officer's return on judicial process cannot be contradicted by the parties or their privies as to such facts stated in it as the law requires to be stated, unless the party collude with the officer to make a false return. This rule prevails in law and equity. As to notices for depositions, or other notices not judicial process, the return is only prima facie evidence of such fact. (p. 151).

Appeal from the Circuit Court, Greenbrier County.

Bill by Charles L. McClung against J. M. McWhorter. Demurrer to bill overruled, and defendant appeals.

Reversed.

L. J. WILLIAMS and CHARLES S. DICE, for appellant.

PRESTON & WALLACE, for appellee.

BRANNON, JUDGE:

J. M. McWhorter recovered a judgment in an action in the circuit court of Greenbrier County against Charles L. McClung. McClung at the same term moved the court to set aside the judgment and give him a new trial, on the ground that he was not served with process, and knew nothing of the suit for several weeks after the return of the process; but the court refused to do so. Then McClung brought this chancery suit to enjoin the enforcement of the judgment. The court overruled McWhorter's demurrer, and perpetuated an injunction, and he appealed.

It is argued that there is error in not sustaining the demurrer, because the bill does not aver that McClung has any defense to the action and why enjoin or grant a new trial if he has not? The law of new trial requires that it be shown that the party has a just defense. So equity does not enjoin a judgment and grant a new trial for a vain purpose. It has even been held that, where there is a false return of service of process in those jurisdictions where equity relieves for that cause, there must be averment and proof that if a new trial is granted a good defense will produce a different result; and such is the preponderance of authority. Tested by this law, the bill is bad. *Gregory* v. *Ford*, 73 Am. Dec. 639; *Freem. Judgm.* § 498; *Taylor* v. *Lewis*, 19 Am. Dec. 135, 139. There is no question that, in general, equity does require such allegation and proof before relief against a judgment; but I think it illogical doctrine, and likely it would be every where so held, where there is no show or color of service of process; and I would think, therefore, that, in states where it is allowable to show the falsity of an officer's return, it should be, likewise, under the doctrine that judgment without notice is void, and its enforcement a taking of property without due process of law. As our courts do not allow regular returns to be falsified, the question is immaterial. If they did, the bill must so state. I have no idea they would require such showing where there is no return of service at all.

The bill relies on one ground only for relief; that is, that the return of the sheriff shows that he served the process

on McClung by delivering it to Vonie Shauver, as a member of his family, and at his usual place of abode, whereas in fact she was not a member of his family, and the place of service was not at his usual place of abode. Thus, the proposition is to deny the facts stated in the sheriffs' return. In many states this can be done, but in this state a sheriff's return on process emanating from the courts (judicial process) cannot be contradicted by parties or privies in its statement of such facts as the law requires him to state to make the return good. The party must, for reparation of his injury, look to an action against the sheriff on his bond for false return. This may seem hard, but public policy requires, for stability of judicial proceedings, that the return of the sworn officer stand. It is a long-established rule with us, and based on sound principles and policy. Its reason, drawn from the United States Supreme Court, is ably defended in *Preston* v. *Kindrick*, 94 Va. 760, (27 S. E. 588) refusing relief in equity against a decree by default where relief was asked on the ground of false return. I will only refer to the cases: *Goodall v. Stuart*, 2 Hen. & M. 112 *Smith* v. *Triplett*, 4 Leigh, 590; *Bowyer* v. *Knapp*, 15 W. Va. 277; *Stuart* v. *Stuart*, 27 W. Va. 168 (Syl., point 10); *Rader* v. *Adamson*, 37 W. Va. 282, (16 S. E. 808); *Peck* v. *Chambers*, 44 W. Va. 270 (28 S. E. 706); *Ramsburg* v. *Kline*, (Va.) 31 S. E. 608). This doctrine does not apply to notices to take depositions, or other notices given by parties, nor to returns by private parties. *Bowyer* v. *Knapp*, and *Chambers* v. *Peck*, *supra*. I remark, too, that, where a suitor colludes with the officer to make a false return, it is not conclusive. That is the exercise of jurisdiction to annul a judgment for fraud.

Another reason against the decree is that, if there were any relief for the cause stated, it was by writ of error for the refusal of a new trial; but there was no relief at law or in equity, as the same rule that the return is conclusive prevails in both courts. Opinion in *Ramsburg* v. *Kline*, *supra*. We reverse the decree, dissolve the injunction, and dismiss the bill.

Reversed.

CHARLESTON.

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47 788
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GOFF v. MCBEE *et al.*

Submitted June 17, 1899—Decided November 28, 1899.

DEMURRER—*Time to Answer—Answer Filed—Reference.*

If the court overrules a demurrer to a bill, and gives the defendant a certain time in which to answer the bill, it can not properly order a reference of the cause to a commissioner to ascertain the amount of the plaintiff's demand till the time has elapsed which was given the defendant to answer; nor can it then order such reference, if the answer is filed, and denies all the facts on which the plaintiff's claim is based. If such answer be filed, no such reference can properly be made till the plaintiff, by evidence, has proven that he has a demand against the defendant. *Neely* v. *Jones*, 16 W. Va. 625. (p. 154).

Appeal from Circuit Court, Ritchie County.

Bill by E. C. Goff against John A. McBee and others. Decree for plaintiff, and defendant McBee appeals.

H. C. SHOWALTER, for appellant.

ROBINSON & PIERPOINT and J. WILLIS FIDLER, for appellee.

ENGLISH, JUDGE:

E. C. Goff, who sued on behalf of himself and all other lien creditors of John A. McBee, filed his bill in equity in the circuit court of Ritchie County on the first Monday in January, 1897, against John A. McBee and others. On the 27th of February, 1897, the cause was heard upon the bill, the answer of the guardian ad litem, with general replication thereto, and upon the demurrer of McBee to said bill, in which the plaintiff joined, which demurrer was overruled, and leave was given said defendant McBee to file his answer therein within thirty days from the date of the decree. On the same day the cause was referred to a commissioner to ascertain the real estate owned by the defendant; the character of same; what interest or estate he has

in the real estate described in Exhibit No. 1 with the bill of complaint; what liens exist against said McBee's real estate, or his interest or estate therein, together with their priority; the rental value of same; and whether such value will in five years pay off and discharge the liens existing against the same. On the 26th of March, 1897, it appears, said defendant lodged among the papers of the cause his answer to plaintiff's bill, which answer was tendered in open court on the 23d of June, 1897, and was ordered to be filed; and on the same day the cause was heard upon the bill, exhibits, and the answers of John A. McBee and of the infant defendants, by their guardian ad litem, and the general replication thereto. Upon the report of the master commissioner filed therein, with the exceptions endorsed thereon by the defendant McBee, which exceptions were overruled, the court decreed that unless the defendant McBee, or some one for him, paid the liens ascertained by said commissioner to exist against said real estate, a commissioner therein named should advertise and sell said one hundred and nineteen acres of land in the manner and upon the terms therein prescribed. From this decree John A. McBee appealed.

This case is in many respects similar to the case of *Neely* v. *Jones*, 16 W. Va. 626, in which it is held (point 7 of the syllabus) that: "If the court overrules a demurrer to a bill, and gives the defendant a certain time in which to answer the bill, it cannot properly order a reference of the cause to a commissioner to ascertain the amount of the plaintiff's demand till the time has elapsed which was given the defendant to answer; nor can it then order such reference, if the answer is filed, and denies all the facts on which the plaintiff's claim is based. If such answer be filed, no such reference can properly be made till the plaintiff, by evidence, has proven that he has a demand against the defendant." In the case at bar the reference to a commissioner was made in the same decree that overruled the demurrer and gave the defendant thirty days in which to answer. The defendant in his answer denied every material allegation contained in the bill, and yet on the same day the answer was filed the court directed a sale of the land. Under the ruling of this court in the case of *Neely*

v. *Jones*, *supra*, the decree complained of must be reversed and the cause remanded to the circuit court for further proceedings to be had therein.

Reversed.

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47 155
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47 464
47 768
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49 825
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CHARLESTON.

CARR *v.* SUMMERFIELD *et al.*

Submitted June 14, 1899—Decided November 28, 1899.

1. **INSOLVENCY.**
   A person is insolvent, within the meaning of section 2, chapter 74, Code, when all his property is not sufficient to pay all his debts. (p. 170).

2. **PURCHASE OF REDEMPTION—*Valid Lien Not Affected by.***
   A valid lien is not devested by the mere fact of the holder of it subsequently taking a transfer of the equity of redemption, made to him with a view of giving him a preference, and in violation of section 2, chapter 74, Code. (p. 177).

3. **INSOLVENCY—*Purchase—Good Faith Priority.***
   A creditor, who purchases and has transferred to him real estate from an insolvent debtor, in good faith, without knowledge of the insolvency, applying his debts on account of the purchase price, and paying in cash the residue of the purchase price, in a proceeding to set aside the preference given him under section 2, chapter 74, Code, he is entitled to preference for the cash paid, under said section, as "a *bona fide* debt contracted at the time such transfer was made" to him. (p. 175).

4. **ASSIGNMENT—*Account—Payee Protected.***
   An assignment of an account, or an order to one who owes the account, to pay the amount due thereon, or any specific part of it, to the payee in the order, is such a transfer of an evidence of debt as will be protected by the last provision of section 2, chapter 74, Code. (p. 179).

Appeal from Circuit Court, Randolph County.

Bill by N. J. Carr against A. H. Summerfield and others. Decree for plaintiff, and defendants appeals.

Modified.

FLICK, WESTENHAVER, & NOLL, and E. A. CUNNINGHAM, for appellants.

L. D. & J. F. STRADER, for appellee.

MCWHORTER, JUDGE:

At April rules, 1897, N. J. Carr filed his bill in the circuit court clerk's office of Randolph county against A. H. Summerfield, John W. Heltzel, C. Ed. Lukins, Columbus Kerens, John W. Teter and Martha Teter, his wife, A. J. Bennett, Hannah Arbogast, Sampson Snyder, J. F. Harding, trustee, Charles Hedrick, Ellen Teter, J. M. Harper, D. S. Cunningham, trustee, and A. H. Harper, Sr., alleging that on the 10th day of August, 1896, defendants Summerfield and John W. Heltzel, executed to plaintiff two notes,—one for one hundred and ninety-two dollars and fifty cents payable fifty days after date, with interest, and the other for one hundred and ninety-two dollars and forty-nine cents, at one hundred and ten days, with interest; that the aggregate amount of said notes was due plaintiff at the date thereof from Summerfield, who procured Heltzel to become his surety in order to procure from plaintiff the time which was given in said notes; that no part of said notes was paid except two small payments of four dollars and fifty cents and twenty dollars, paid, respectively, November 2, 1896, and February 9, 1897; and that defendant Summerfield was also indebted to plaintiff in the further sum of fifteen dollars and twenty-six cents on account of saw logs sold him,—and filed said notes and account as exhibits; alleging that defendant Summerfield was, until a short time before the institution of his suit, the owner of considerable real and personal property, and was considered by his neighbors generally to be solvent, and able to pay his debts; and a very few days after he commenced disposing of his property, as thereinafter stated, the said Summerfield represented to his creditors, and especially those to whom he did not sell property, that he was broke

up, and insolvent. The bill alleges that he was the owner of a valuable boundary of land on the Alleghany Mountain, part of which is in Randolph County and part in Pendleton County, which, by deed, it was claimed he conveyed to Charles Ed. Lukins, acknowledging therein as the consideration two thousand dollars paid in hand; that about the time of the alleged sale to Lukins, which was a short time before the bringing of this suit, said Summerfield sold and conveyed to defendant John W. Heltzel a tract of one hundred and fourteen acres and an undivided sixth in a tract of three hundred and twenty-five acres on the waters of Shaver's Fork in Randolph County; that about the same time he sold to defendant Columbus Kerens about five hundred dollars worth of sawed lumber and saw logs; that about the same time he sold to defendant A. J. Bennett certain live stock, consisting of one yearling, two calves, two horses, one mule, about fifty thousand feet of sawed lumber, one haystack, and assigned to him a claim of five hundred dollars upon parties to whom said Summerfield had theretofore sold lumber; that about the same time he sold to defendants John Teter and Martha Teter, his wife, or to one of them, two horses, three cows, and one wagon, and perhaps other personal property; that some time before these transactions said Summerfield conveyed a tract of sixty acres of land in trust to defendant J. F. Harding, trustee, to secure the payment of a debt to defendant Charles Hedrick, a debt to the defendant John Teter, and debt to defendant Ellen Teter, but whether said debts had ever been paid, or what had become of the said Summerfield's title to said land, plaintiff was not advised; that by deed of May 21, 1896, Summerfield conveyed to defendant D. S. Cunningham a tract of forty-five acres on Dry Fork of Cheat in said Randolph County, to secure a debt of six hundred and thirty-eight dollars and forty-five cents to the defendant A. H. Harper, Sr.; that plaintiff was informed that same was sold under said trust deed, and bought by said Harper, and the debt paid; that defendant Hannah Arbogast had docketed upon the judgment lien docket of Randolph County a judgment for seventeen dollars and ninety-five cents costs against Summerfield and defendant Sampson Snyder, but whether it had been paid

plaintiff was not advised; that defendant J. M. Harper obtained a judgment in the circuit court of Randolph County against Summerfield at the January term, 1897, for three hundred and twenty-five dollars and twenty-eight cents and costs, upon which execution was issued, and returned by the sheriff "No property found;" that, at the time of the conveyance of the real estate to the defendant Lukins and to Heltzel, and the sales of the personal property to the other defendants by said Summerfield, as stated, and the assignment to the defendant Bennett of the claim for lumber sold, the said Summerfield was insolvent, and that the sales of said property were fraudulent as to plaintiff's debt, and said sales should be held and treated for the benefit of all the creditors of said Summerfield, because at the time of the several conveyances and sales the said Summerfield was indebted to the said parties, respectively, to whom the same were made, and that by the said sales and conveyances Summerfield disposed of all his property, and that, if it should turn out that said Summerfield was not insolvent at the time of making said sales and conveyances, then they were voluntary, and therefore fraudulent as to creditors of said Summerfield, and that said sales and conveyances were made with intent on the part of Summerfield to hinder, delay, and defraud his creditors, and especially plaintiff, in the collection of his debt, and that the purchasers of said property had notice of such intent of said Summerfield; that defendant Lukins had not in fact paid said Summerfield for the real estate so purchased by him, and that he was still indebted to Summerfield therefor for a considerable portion of the purchase money; that Summerfield was still residing on said land, and that the transaction between him and Lukins was intended to deprive the plaintiff of the collection of his debt,—and prayed that each of the purchasers of the real and personal property from said Summerfield be required to answer the bill, and disclose what their debts were at the time of the said purchases, respectively, what property they so purchased, what the said Summerfield is entitled to have paid to him or his creditors from them, respectively, on account of such sales; that the debts against Summerfield be ascertained, and that the property, real and personal, be sold,

and the proceeds applied to the debts of Summerfield *pro rata*; that said deeds to Lukins and Heltzel be set aside, and the property thereby conveyed be sold to pay the debts, and, if that could not be done under the facts as they should be made to appear in the cause, that each of said purchasers might be required to pay upon the several unpaid debts of said Summerfield any balance of purchase money which they might owe upon the property so purchased by them; and for general relief.

Defendant Summerfield filed his answer, admitting the claim of plaintiff as set up in the bill; that he made the conveyances to Charles Ed. Lukins and John W. Heltzel as charged, and the execution of the trust deed to D. S. Cunningham to secure the payment of six hundred and thirty-eight dollars and forty-five cents to A. H. Harper, Sr., but averring that said debt had been discharged by an absolute conveyance of said land in fee to said Harper, admitting that he sold to defendant Kerens certain saw logs and sawed lumber about the time it was alleged to have been done, but denies said lumber amounted to near five hundred dollars; that he sold to A. J. Bennett the personal property mentioned in the bill, and that he assigned to him an order on William Whitmer & Sons for five hundred and eighty-five dollars and sixty-eight cents mentioned in the bill as five hundred dollars, and that he sold to John Teter and Martha, his wife, the property as alleged; that defendant Heltzel agreed to pay off the debt to plaintiff, and release plaintiff from all liability, in consideration whereof, and the further consideration of the payment of the J. M. Harper judgment by said Heltzel for respondent he in good faith conveying to Heltzel the real estate mentioned in the bill,—one hundred and fourteen acres and one-sixth of three hundred and twenty-five acres; that, while said deed inadvertently recites a consideration of five hundred dollars, no other consideration than aforesaid passed between Heltzel and respondent in the conveyance, and that said real estate was amply worth the aggregate amounts of said debts, with accrued interest and costs, and that Heltzel was wholly solvent, as respondent was advised and believed; that the conveyance to Lukins was made in good faith, for valuable consideration; that re-

spondent was thoroughly solvent, and without any intention of fraud on his part, or to hinder or delay his creditors, or to prefer one over the other and that the sale of the personal property to A. J. Bennett and the assignment to him of the order for five hundred and eighty-five dollars and sixty-eight cents on William Whitmer & Sons was in good faith, and for valuable consideration; that the payment of the sum of nine hundred and eighty-nine dollars and sixty cents in the aggregate, which respondent then justly owed Bennett, was done without any fraudulent intention, or to hinder and delay the plaintiff in the collection of his debt; the sales to Columbus Kerens and to John and Martha Teter were also made in good faith, and for valuable consideration, and without fraud, or intent to hinder and delay his creditors; and denies that said sales should be held and treated for the benefit of respondent's creditors, or that said sales were either voluntary or fraudulent as to creditors; and denied each and every allegation of the bill not admitted, and required strict proof on the part of plaintiff.

Defendant Charles Ed. Lukins filed his answer, admitting the purchase of the land conveyed to him by Summerfield. That he paid one thousand nine hundred and seventy-two dollars, as follows: "By amount of debt due from A. H. Summerfield to respondent for the sum of six hundred and sixty-three dollars and fifty-five cents, including interest, the same being secured by a deed of trust executed May 23, 1896, and of record in the clerks' office of the county court of Pendleton County; by the further sum of three hundred and eighty-four dollars and eighty-six cents, including interest, amount of A. H. Summerfield's note to respondent, executed August 11, 1896; by the further sum of six hundred and one dollars and eighty-four cents, including interest, amount of A. H. Summerfield's note to respondent, executed November 10, 1896, and by the further sum of three hundred and twenty-one dollars and seventy-five cents, cash in hand paid by respondent to A. H. Summerfield on date of deeds. That all of the aforesaid debts had been contracted by said A. H. Summerfield to respondent in good faith, and for valuable consideration, and at the date of making said deeds were due and paya-

ble to respondent." That respondent at said date had no knowledge whatever of the alleged insolvency of said Summerfield, or of his alleged intention to hinder, delay, and defraud plaintiff in the collection of his debt, or to make preference in favor of any of his creditors over others. And therefore he says said deeds were not for a voluntary consideration as alleged, and denies the right of plaintiff to have them set aside in a court of equity, and denies generally each and every allegation of the bill not admitted, and calls for proof of each allegation relating to respondent.

Defendant A. J. Bennett answered, and admitted the assignment to him of the claim on William Whitmer & Sons for five hundred and eighty-five dollars and sixty-eight cents, and the purchase of the personal property from Summerfield, altogether aggregating nine hundred and eighty-nine dollars and sixty-eight cents, which assignment and transfer of property was in full of Summerfield's indebtedness to him; that the transaction was done in good faith on his part; and denies that at the time or before the transaction and the filing of plaintiff's bill he had any knowledge of the alleged insolvency of Summerfield, the preferment of any of his creditors to others, or of any intention on the part of Summerfield to hinder, delay, and defraud plaintiff in the collection of his debt; and denies any intention on his part to so hinder, delay, and defraud pliantiff; and denies generally each and every allegation of the bill with reference to him not admitted, and calls for strict proof of same on part of plaintiff,—all of which answers are sworn to.

Defendant Columbus Kerens answered, admitting that he purchased certain lumber from Summerfield, which was afterwards to be scaled and measured, which amounted to the sum of two hundred and eighty-three dollars and sixteen cents by actual measurement; that said purchase was made in good faith, and for valuable consideration, which had been paid by respondent to Summerfield before the institution of plaintiff's suit; that respondent had no knowledge of the alleged insolvency of said Summerfield at the time of the transaction or the filing of plaintiff's bill; that he had no intention, in the purchase of said lumber, to in

any manner hinder, defraud, and delay the plaintiff in the collection of his debts against said Summerfield, and, further, had no knowledge of the alleged preference of any of his creditors one over the other; and denied each and every allegation of the bill not admitted, and called for strict proof of the same. This answer is not sworn to.

Depositions were taken, and the cause heard on October 14, 1897, and was referred to Commissioner W. E. Baker to ascertain and report the real estate owned by defendant Summerfield on the 11th of January 1897; the date of the deeds made to defendant Lukins, the value of the said real estate, including that so conveyed; the debts owing by said Summerfield, the amounts thereof, to whom owing; whether any liens existed upon said real estate, or any part thereof; and whether said Summerfield was insolvent at the date of said deeds of conveyance, or whether he was insolvent prior thereto; and what personal property he had disposed of, as well as real estate, since the date of his insolvency, and what he was the owner of at the time of the decree, and the value of same. The commissioner filed his report, showing the value of all real estate belonging to Summerfield on the 11th day of January, 1897, to be three thousand one hundred dollars, and the personal property owned by him on the 1st day of January, 1897, one thousand three hundred and thirty-nine dollars and sixty-eight cents,—making a total of assets of four thousand four hundred and thirty-nine dollars and sixty-eight cents,—all of which was disposed of by said Summerfield after his insolvency, which he found to exist on the 1st day of January, 1897. The commissioner also ascertained the debts owing by said Summerfield on the said 1st day of January to aggregate the sum of four thousand nine hundred and forty dollars and forty-nine cents. To this report the defendants Summerfield, Bennett, Lukins, Kerens, and John and Martha Teter indorsed seven exceptions: Because he erroneously reports that, in his opinion, Summerfield was insolvent on the 1st day of January, 1897; because he erroneously reports the value of the one hundred and fourteen acre tract and the one-sixth of three hundred and twenty-five acres, conveyed by Summerfield to Heltzel by deed of February 22, 1897, to be only five hundred dollars; because he er-

roneously reports a debt in favor of John W. Heltzel against Summerfield for the sum of eight hundred dollars; because he erroneously includes in the list of debts upon which he bases his report of the insolvency of said Summerfield, debts named therein, and aggregating one thousand and fifteen dollars and forty-two cents, which exceptors claim are unsupported by proof that they were in existence on the 1st day of January, 1897, the date of the reported insolvency of Summerfield; and because the commissioner erroneously charges Summerfield with certain debts or judgments named, without making his co-obligors partners to the suit, and without which judgments they claim Summerfield could not be found insolvent. Plaintiff also excepted to the report because the commissioner, in ascertaining and reporting debts due from Summerfield to the several creditors named by him, including plaintiff, had not ascertained and reported the interest accrued, so that the court could base a decree thereon. And W. C. Harman & Co. excepted to the report in so far as it failed to give their judgment priority of lien against the real estate of Summerfield over all other judgments, because it was first recorded, as shown by said report.

On the 1st day of February, 1898, the cause was again heard, when the said several exceptions to the report were overruled, as was also a demurrer to the bill. It was ascertained that defendant Summerfield was insolvent on the 1st day of January, 1897, and that all sales made by him, after that date, of his real estate and personal property, to creditors, by which he attempted to prefer creditors, were fraudulent as to such preference, and that such sales should be treated as having been made for the benefit of all creditors; and decreeing that, said sales appearing to be for an adequate price, the same should be confirmed at the prices for which the property was sold by him, except the sale and conveyance to Heltzel of one hundred and fourteen acres and one-sixth of three hundred and twenty-five acres, which sale should be set aside, and accordingly confirmed the sales to Lukins,—the one at one thousand four hundred and seventy-two dollars, the other at five hundred dollars,—and the sale of personal property to A. J. Bennett, aggregating nine hundred and eighty-nine dollars

and sixty-eight cents; and the sale of the lumber to Kerens at two hundred and fifty dollars, for the benefit of all the creditors of Summerfield, and set aside the sale to Heltzel, and proceeded to ascertain the liens upon the said one hundred and fourteen acres and one-sixth of three hundred and twenty-five acres; that the judgment of defendant Hannah Arbogast for twenty dollars and forty-five cents was the first lien, and the judgment of J. M. Harper for three hundred and fifty-six dollars and twenty-five cents was next in order of priority, and decreed a sale of said property to satisfy said liens; and the cause was recommitted to the said commissioner to ascertain and report all the valid debts existing against said A. H. Summerfield, to whom owing, and the amounts thereof at the times of the sales of the property theretofore reported by said commissioner as having been made after the insolvency of said Summerfield, and the priorities of said debts, if any, as liens on any of said property, and to ascertain the pro rata amount to which each of the creditors may be entitled by reason of said sales of the property being treated as having been made by Summerfield for the benefit of all his creditors, except as to specific liens. The commissioner again reported, to which report exceptions were indorsed as follows: "Defendants Chas. Ed. Lukins, Columbus Kerens, and A. J. Bennett make and indorse the following exceptions to both reports of Comr. Baker filed in this cause at the present term, May, 1898, of this court, the same to apply as if specifically indorsed upon each report: (1) They except to the item of eight hundred dollars allowed in said reports to defendant John W. Heltzel, because no note, statement in writing, or other itemized account, with the dates thereof, have been filed by him in this cause, upon which to base said report, and to enable these co-defendants to make proper defense thereto, as they are entitled in a court of equity; that the evidence in support of said item is entirely too vague, indefinite, and unsatisfactory to sustain it as a charge against said Summerfield to the prejudice of defendants now excepting. (2) That said reports fail to charge said Heltzel with the specific execution of his contract in the purchase of the one hundred and fourteen acres and the undivided one-sixth of three hun-

dued and twenty-five acres of land mentioned and described in complainant's bill from said Summerfield with full knowledge on his part of the insolvency of said Summerfield at the date of purchase, with the fraudulent intent upon his part of securing his alleged debt from Summerfield to the prejudice of these defendants. (3) That said reports fail to show that all of the real estate owned by the said Summerfield at the date of his insolvency as found by a former report herein, to wit, on the 1st day of January, 1897, including the tracts purchased by said Lukins, had not been sold at the date of the said report, and therefore the pro rata amounts found in favor of each creditor mentioned in said reports are incorrect, and should be set aside. (4) Chas. Ed. Lukins especially excepts to said reports because they fail to allow him the full amount of his debt from said Summerfield, the sum of six hundred and thirty-eight dollars and forty-five cents, with its accrued interest, secured by deed of trust executed by said Summerfield and wife on the 16th day of June, 1896, and duly admitted to record in the clerk's office of the county court of Pendleton County, the county in which said real estate is situate, and because said reports fail to report the priority of said trust debt according to its dignity. (5) That said reports fail to allow him the sum of three hundred and sixty-four dollars, amount of cash purchase money paid by him to said Summerfield in part payment of said real estate, in payment of a bona fide debt contracted at the time the transfer was made thereof to him by said Summerfield, and is not affected by said transfer. (6) The defendant A. J. Bennett excepts especially to said reports because they fail to allow him the full sum of eight hundred and eighty-nine dollars and sixty cents, the amount of the order on Wm. Whitmer & Sons, with its accrued interest, which was on the —— day of February, 1897, transferred to him by said Summerfield in payment of a bona fide debt then due from said Summerfield to him, and is not affected by said transfer. (7) These defendants except to said reports because they were prematurely made, the real estate of the said Summerfield owned by him on the 1st day of January, 1897, not having been sold, the proceeds therefrom ascertained, and for other errors apparent therein."

On the 7th day of May, 1898, the cause was again heard upon papers and former proceedings, and upon the special commissioner's report of sale of the one hundred and fourteen acres and the one-sixth of three hundred and twenty-five acres, which was sold to the lien holder J. M. Harper at the price of two hundred and fifty-two dollars, which sale was confirmed by the court, and the proceeds of the sale applied, first, to the costs of sale, then the small judgment of Hannah Arbogast, and the residue to the judgment of said J. M. Harper; and it appearing to the court from the last report of Commissioner Baker that by reason of the payment of the debt of Arbogast, and the credit placed upon the judgment of J. M. Harper from the proceeds of said sale by Commissioner Strader, it would be necessary to reform the statement of the per cent. of the pro rata share of each creditor, so that a decree could be made, the cause was therefore recommitted to Commissioner Baker, with instructions to reform his report by making a calculation and statement of the debts reported by him against the defendant A. H. Summerfield, and by showing the proper amount to which each creditor will be entitled by reason of the property sold by him to the defendants C. Ed. Lukins, Columbus Kerens, and A. J. Bennett, after the application of the proceeds of the sale of land by Commissioner Strader, and that he report forthwith. Said commissioner filed his report, correcting the per cent. to be paid as directed. The cause came on again to be heard on the 14th of May, 1898, when the defendants Charles Ed. Lukins and A. J. Bennett tendered their separate amended and supplemental answers in the nature of cross bills to the bill of plaintiff, to the filing of which plaintiff objected, but the objection was overruled, and the answers allowed to be filed, to which plaintiff replied generally; and, the court being of the opinion that the cause should not be delayed by reason of the filing of said answers, the cause was brought on to be heard upon the reports of Commissioner Baker, and the several exceptions indorsed thereon by defendants Lukins, Kerens, and Bennett, the said answers, and general replication thereto. The court overruled the said seven exceptions, and confirmed the reports, and proceeded to decree that: "there

is a liability upon the defendant C. Ed. Lukins for the sum of two thousand one hundred and twenty-five dollars and eighty-two cents, with interest from the 2d day of May, 1898, but subject to a credit of one thousand and thirty-nine dollars and sixty-five cents as of May, 10, 1898, and upon the defendant A. J. Bennett, one thousand and sixty-six dollars and seventy-eight cents, with interest from May 2, 1898, subject to a credit of six hundred and twenty-two dollars and twenty-eight cents as of May 10, 1898, and upon the defendant Columbus Kerens, two hundred and sixty-eight dollars and seventy-five cents, with interest from the 2d day of May, 1898, subject to a credit of one hundred and seven dollars and nine cents, as of May 10, 1898, which sums, subject to the credits aforesaid, are the amounts for which they are liable on account of the property purchased by them of the defendant A. H. Summerfield, and the said credits are the pro rata share of the proceeds of the sales of the property made by the defendant A. H. Summerfield, and to which credits the said Lukins, Bennett, and Kerens are entitled. It is therefore adjudged, ordered, and decreed that, after the credits aforesaid, the said Bennett, Lukins, and Kerens do pay the said sums of money, respectively, to J. F. Strader, special commissioner, who is hereby appointed for the purpose of collecting the same, and paying it upon the debts hereinafter provided for, without priority as to each other," etc., and providing that said commissioner might sue out executions therefor, and that said Lukins, Bennett, and Kerens do pay the plaintiff his costs of said suit.

The answers just referred to as filed raised the same questions raised by the exceptions to Commissioner Baker's reports. That of defendant Lukins, relying upon the denials and allegations of his former answer says, that, even in the case of the insolvency of said Summerfield at the date of the deeds to respondent, he is entitled to the following priorities in favor of himself out of the one thousand nine hundred and seventy-two dollars, the purchase price of the real estate purchased by him over the plaintiff and other creditors of said Summerfield, to wit: One note for six hundred and thirty-eight dollars and forty-five cents, with interest from May 23, 1896, which was secured

by trust deed dated June 16, 1896, on the same real estate purchased by him, which deed of trust is made a part of the cross bill and answer; also the sum of three hundred and sixty-three dollars and fifty-five cents, the amount of cash paid in hand by him to Summerfield at the date of the sale as part payment of the purchase money therefor, which was paid on a bona fide debt contracted by him to Summerfield at the time the conveyance was made; that in such case of insolvency no pro rata distribution in favor of the creditors of Summerfield can be made until a sale shall have been made of the real estate conveyed by said Summerfield thereafter; and avers that the sum of eight hundred dollars allowed to his co-defendant Heltzel against Summerfield by the reports of Commissioner Baker is unsupported by adequate proof or pleadings, is without legal foundation or bona fide consideration, and denies the valid existence of any such claim, and calls upon Heltzel to file his proper answer in the cause in his own behalf, so as to inform respondent of the date, amount, and true character of said claim, or any other claim of indebtedness he may choose to set up against Summerfield in the cause; that said Heltzel having purchased said land with the full knowledge of the alleged insolvency of Summerfield, he should be held to the specific performance of his contract to the amount of the purchase price, and the same should be held as a set-off against the debt in his favor claimed by him; and alleges that paintiff is not entitled to a confirmation of the sale of the real estate purchased by respondent, but, in case of the insolvency of Summerfield it should be sold, and the proceeds of sale accounted for, and applied to the payment of Summerfield's indebtedness in the manner prescribed by law; that Summerfield left this state before Heltzel's deposition was taken in the cause, without any knowledge, as far as respondent was advised, of the existence of any such claim, and has failed to return, and make the necessary defense against it, greatly to the prejudice of respondent; and prays that Heltzel, plaintiff, Carr, and the other creditors be made parties defendant to his answer and cross bill, and required to answer same, etc., and for general relief. Defendant A. J. Bennett's answer and cross bill is to the same effect, and alleges that the assign-

ment and transfer of the order to him by Summerfield on William Whitmer & Sons, for the sum of five hundred and eighty-five dollars and sixty-eight cents, even in case of the insolvency of Summerfield, is not affected by such insolvency, for the reason that it was an evidence of debt made in part payment of a bona fide debt then due and payable from Summerfield to him, and denies the right of plaintiff, Carr, or other creditors of Summerfield, to recover, pro rata or otherwise, on account of said transfer or assignment, and closes with a prayer similar to that of Lukins.

From said several decrees the defendants C. Ed. Lukins and A. J. Bennett appealed to this court, and assigned seven errors. The first is that Commissioner Baker found that defendant A. H. Summerfield was insolvent on the 1st day of January, 1897, which finding was confirmed by the decree of February 1, 1898, while appellants claim that the evidence returned by the commissioner was so indefinite and inadequate as clearly to fail to warrant the finding. Summerfield became involved, and in 1896 executed several deeds of trust on parts of his real estate, and in the last of that year began to be sued; J. M. Harper recovering a judgment in January, 1897, for over three hundred dollars, an execution issued on which was returned "No property found" before the bringing of this suit. He began in January to dispose of his property to his creditors on account of their debts, and in a very short time had disposed of all of it. The first so conveyed was that to defendant Lukins by two deeds of date January 11th and acknowledged on the 19th of the same month. He sold and transferred to defendant Kerens his lumber to a greater amount than he owed him, requesting him to pay the excess after paying himself to other creditors. And to another creditor, the defendant A. J. Bennett, he gave an order on a firm who owed him for lumber in the sum of five hundred and eighty-five dollars and sixty-eight cents, and sold him stock sufficient to pay him the residue of what he owed him (in all, the sum of nine hundred and eighty-nine dollars and sixty cents), and sold and transferred personal property to his relatives, John W. Teter and wife, and conveyed real estate to John W. Heltzel, the price of which was to apply on a debt to himself after paying the Hannah Arbogast and

J. M. Harper judgments, which were liens thereon, or, as claimed in Summerfield's answer, after paying said judgments he was to pay the notes sued on by plaintiff. It is true, the evidence is not clear as to the dates of the creation of some of the debts of Summerfield, but the circumstances very clearly show that they existed at the time he began disposing of his property in January, 1897. There is no evidence that he contracted a single debt after that time, and he seems to have wound up his estate in about as short a time as a business of that kind could have been "closed out." The record shows that Summerfield's assets will not pay over seventy-five per cent. of his debts, and should it turn out that the Heltzel debt of eight hundred dollars should on proper investigation be greatly reduced, or even wholly disallowed, still the assets will lack a considerable percentage of paying out. During the time he was disposing of his property, Summerfield told several persons that he was "broke up," and could not pay his debts. "A person is insolvent, within the meaning of section 2, chapter 74, Code, when all his property is not sufficent to pay all his debts." *Wolf* v. *McGuigin*, 37 W. Va. 552, (16 S. E. 797).

Second assignment: "That the commissioner's report, confirmed by decree of February 1st, allows a debt due from A. H. Summerfield to John W. Heltzel in the sum of eight hundred dollars, which is inadequately proved, although appellants excepted to said report on this ground, and called for such proof of the claim as would enable them to defend against it." It seems to me that the exception to this claim as not being adequately proven is well taken. There is no account or statement of any kind showing the nature or character of the claim, except what appears in the testimony of John W. Heltzel; and he fails to give any dates, and very little of the particulars about the claim. In his deposition taken August 25, 1897, he says, "Mr. Summerfield was in debt to me about eight hundred dollars;" and on being recalled by the commissioner on the 18th of April, 1898, he is asked the question: "State what amount of money was due you on the 1st of January, 1897, from A. H. Summerfield, and for what was the same due. Ans. He was due me eight hundred dollars for lumber

purchased of me, and for sawing the same. He purchased from me about two hundred and fourteen thousand feet of logs on the skidway, and I was to saw the same, for which logs and sawing I was to receive the sum of nine dollars and twenty-five cents per thousand feet, and he has paid me one thousand and fifty dollars; and there is some lumber, from which I will I think receive enough to reduce this claim to eight hundred dollars, or at least it is understood that I am to get it. All of the eight hundred dollars still remains unpaid." This answer clearly reveals the fact that he had with Summerfield an executory contract. The money for the lumber was only to become due to him when he had performed his contract, in sawing the logs into lumber. This was his duty under the contract, and he does not show by his own testimony, even, that he did the work or had so fulfilled his part of the contract as to entitle him to the money claimed. Heltzel is made a party defendant to the plaintiff's bill by reason of his taking from Summerfield a conveyance of the one hundred and fourteen acres and one-sixth of three hundred and twenty-five acres of land, which plaintiff seeks to have set aside as fraudulently giving preference to certain creditors over others. Heltzel fails to answer the bill and set up his claim, if any he had, while Summerfield filed an answer under oath averring that Summerfield conveyed to Heltzel the one hundred and fourteen acres and the one-sixth of three hundred and twenty-five acres in February, 1897, and that in consideration thereof Heltzel agreed to pay the notes held by plaintiff and release respondent from any liability thereon, and also to pay off the judgment of J. M. Harper, and averring that the said real estate so conveyed was amply worth the aggregate amount of said debts, with the accrued interest and costs. This allegation in the answer of Summerfield is corroborated by the testimony of D. S. Cunningham, taken in the cause, who wrote the deed from Summerfield to Heltzel conveying said one hundred and fourteen acres and one-sixth of three hundred and twenty-five acres. Cunningham says, referring to conversation between Heltzel and Summerfield: "Ans. The first conversation that took place in my presence was that John W. Heltzel was to pay one thousand dollars to Summerfield for

a certain tract of land,—this same tract of land. He was to pay N. J. Carr the amount that Summerfield was due Carr, and Summerfield the remainder. The second conversation, they told me to write the consideration in the deed, five hundred dollars. Heltzel said that they had then ascertained that Jode M. Harper had a judgment of three hundred and some dollars against Summerfield, which would have to be paid. He said they would make the consideration five hundred, instead of a thousand, now. Heltzel claimed that, if they would make the consideration a thousand dollars, that he would probably have to pay Summerfield the difference between N. J. Carr's debt and the thousand dollars, and he felt satisfied that Jode M. Harper's debt would have to be paid out of this amount. After the payment of Carr's debt and Harper's debt, if there was a balance back, Heltzel was to pay this to Summerfield." He further states that the deed was dated February 22, 1897, and that Heltzel then agreed with Summerfield to pay the N. J. Carr debt out of the proceeds, or rather out of the consideration given for said land. It is contended by appellant that the answer of Summerfield, being under oath, becomes evidence, and he cites *Johnson* v. *Riley*, 41 W. Va. 140, 145, (23 S. E. 698), in support of his contention. It is there said in the opinion of the court: "It is also settled that when the plaintiff requires the defendant to file his answer under oath the answer will be taken as true, unless contradicted by competent evidence. * * * By his appeal to the defendant's conscience he attributed to him credibility, and made a witness of him." In case at bar, however, the plaintiff's bill was not sworn to. Hence, the answer was not required to be sworn to; and under the statute no additional weight is given to it by reason of its being sworn to, in any event. *Code*, c. 125, s. 38; *Rogers* v. *Verlander*, 20 W. Va. 619. Yet it is a fact stated in the sworn answer of Summerfield that Heltzel agreed, as a part of the consideration for the land conveyed to him, that he would pay the Carr notes, which answer was made and filed in May, 1897; and, although Heltzel did not answer the bill, his deposition was taken in the cause on the 25th of August, 1897, and he did not then deny the fact stated by Summerfield. On September 14, 1897, D. S.

Cunningham's deposition was taken, and he stated as above set forth in his "Ans. 3." On the 18th of April, 1898, Heltzel's deposition was again taken, and he failed to deny the fact or make any explanation. Here there is the undisputed fact that Heltzel agreed with Summerfield in February, 1897, to pay the Carr notes in part consideration of the two tracts of land conveyed to him, and yet in his deposition he states that Summerfield owed him on the 1st of January, 1897, the sum of eight hundred dollars. Columbus Kerens states in his deposition taken on the 25th of August, 1897, that, maybe a month after he bought the lumber from Summerfield, he (Summerfield) told him that, if there was anything over what they agreed on the lumber, he wanted him to pay it to John Heltzel on the debt Summerfield owed him; that Heltzel was likely to have to pay some money on Summerfield's official bond, and Summerfield said he would like to have N. J. Carr paid fifteen dollars and seven cents, if there was enough over their contract to pay him. The record shows that Summerfield owed Carr a small account, of something over fifteen dollars, aside from the notes Heltzel was to pay. Is it at all probable that Heltzel would agree to pay for Summerfield to Carr the two notes, of nearly four hundred dollars, when Summerfield was then due him individually on account more than twice that sum? The record shows that Summerfield had left the state before the first deposition of Heltzel was taken, and could not be present to answer the claim set up by Heltzel in his deposition.

The third assignment is by appellant Lukins,—that the court erred in confirming to him, against his protest, the sale of the two tracts of land, and decreeing against him for the appraised value, instead of reselling the property. The first part of this assignment is not sustained by the record which does not show a protest by the appellant against the confirmation of the sale, but at the time of the making of said decree confirming the sale to him on February 1, 1898, the case stood upon his answer denying the right of plaintiff to have the sale set aside. The cause, it appears, came on to be heard, among other things, "upon the demurrer of A. H. Summerfield, Chas. Ed. Lukins, A. J. Bennett, and Columbus Kerens to plaintiff's bill, and

upon the cross bills of the same parties who demurred, and was argued by counsel. Upon consideration thereof, it is adjudged, ordered, and decreed that the said several exceptions and the demurrer to plaintiff's bill be overruled, and the cross bills be rejected; and, the defendants having answered heretofore, the right to answer further is waived for this term." The decree then proceeds to confirm the sales to Lukins, Bennett, and Kerens, and to set aside the sale to Heltzel, and provide for the sale of the property which had been sold to Heltzel. There is nothing in the record to show the nature of the cross bills rejected on the 1st day of February. This waiver to further answer for the term was an acquiescence in the decree confirming the sales. There is no protest, in any shape or form, against the confirmation until it is found in the cross bill filed by him the 14th of May, but which is stated to have been filed before Commissioner Baker on the 28th of March, 1898, nearly two months after the confirmation of the sale. There could be no object in setting aside the sales, and having a resale of the property, when all parties were satisfied with the adequacy of the process paid; and the sales having been confirmed without opposition, and after the declaration of the court of the insolvency of the debtor prior to the said sales, it is too late for the purchaser to object to the confirmation. On this point, however, the majority of the court disagree with my views, and hold that appellant did not acquiesce in the confirmation of the sale because of his waiver of right to further answer at that term, but that he still has a right to object to confirmation, and that the sale should be set aside, and the property resold for the benefit of all the creditors, and that the court erred in confirming the sale before reference to a commissioner to ascertain liens. The principal complaint or cause of this assignment is that the court confirmed the sale to appellant, and decreed against him for the appraised value of the property, without giving him his proper preferences. The latter part of this assignment is covered by the fourth and fifth; the former being that the court erred in "that, while it appears uncontroverted in the evidence that he paid said Summerfield the sum of three hundred and twenty-one dollars and seventy-

five cents in cash as part payment for the land sold to him, the decrees complained of do not give him the priority given by law for the purchase money, paid cash in good faith, but simply treats this sum as a general debt due from Summerfield to him, for which he is entitled, with other creditors, to a pro rata distribution out of the estate of said Summerfield." One proviso in section 2, chapter 74, Code, amended by chapter 5, Acts 1895, is "that nothing in this section shall be taken to prevent the making of a preference as a security for the payment of purchase money or a *bona fide* loan of money, or other *bona fide* debt contracted at the time such transfer or charge was made, or as security for one who at the time of such transfer or charge becomes an indorser or surety for the payment of money then borrowed." Appellant Lukins insists that having purchased the real estate in good faith for full value, and without knowledge or suspicion, even, of the insolvency of his debtor and grantor, in addition to his own debts, secured and unsecured, he paid in cash three hundred and twenty-one dollars and seventy-five cents, which amount ought to be secured to him as purchase money or a *bona fide* debt contracted at the time such transfer was made under said proviso. It cannot be such "purchase money" as is contemplated in said clause that may be secured with preference. That evidently means the purchase money due from the insolvent to his grantor or vendor as purchaser of the property so transfered. Was it in any sense a loan of money, or a debt contracted at the time of the transfer, to bring it within the provision of the making of a preference as security for the payment of a *bona fide* loan of money or other *bona fide* debt contracted at the time of the transfer? There was a sale by the insolvent to the appellant, made in perfect good faith on the part of the purchaser; and after applying the debts due from the grantor there was a balance of three hundred and twenty-one dollars and seventy-five cents, which was paid to the grantor in cash, as the residue of the purchase money of the land. It is not contended that the insolvent could not sell and convey his property to a *bona fide* purchaser notwithstanding his insolvency. There is something of an effort in the

brief of appellees to show, by arguing from circumstances, that Lukins knew of the insolvency of Summerfield when he took the conveyance, and joined with him in his fraudulent efforts to hinder and delay his creditors; but it is emphatically denied by Lukins, both in his answer and his testimony, and there is nothing contained in the record to overcome it. Lukins lived in another county from that of Summerfield, and there is nothing to show that he was at all familiar with his affairs. The purpose of section 2, chapter 74, Code, is to prevent preferences by an insolvent debtor among his creditors, and it provides that: "Every transfer or charge made by an insolvent debtor attempting to prefer any creditor of such insolvent debtor or to secure such a creditor or any surety or endorser for a debt to the exclusion or prejudice of any other creditor, shall be void as to such preference or security, but shall be taken to be for the benefit of all creditors of such debtor. And all the property so attempted to be transferred or charged shall be applied and paid *pro rata* upon all the debts owed by such debtor at the time such transfer or charge is made." The cash consideration paid by Lukins (the three hundred and twenty-one dollars and seventy five cents) became and was a *bona fide* debt due from Summerfield to Lukins, contracted at the time the transfer was made, whenever it was ascertained that Summerfield was insolvent before and at the time of the transfer, and should be treated as a prefered debt under said section 2.

Fifth assignment: That the court erred in not recognizing the priority of appellant Lukins' prior deed of trust for six hundred and thirty-eight dollars and forty-five cents on the ninety-nine-acre tract of land included in the transfer. The deed from Summerfield to Lukins, being dated January 11,1897, which was avoided as an illegal preference, included a tract of ninety-nine acres, on which Lukins had a deed of trust, executed by Summerfield, bearing date June 16, 1896, securing to him the payment of the sum of six hundred and thirty-eight dollars and forty-five cents with interest from May 3, 1896, which was duly acknowledged and recorded, the amount of which, together with two other notes made to Lukins by Summerfield, and the three hundred and twenty-one dollars and seventy-five

cents in cash, made one thousand nine hundred and seventy-two dollars, the amount of the consideration paid by Lukins for the transfer. No question has been raised in the cause as to the validity of the deed of trust, or the two other notes which entered into and made part of the consideration. It is contended by appellee that when Lukins accepted the transfer "he gave up by his purchase his specific lien, and received his pay in land, and surrendered the lien, and took his chances with other creditors of Summerfield to be paid *pro rato*, if the other creditors, or any of them should complain in a court of equity within the short time allowed by the statute," and insist that he has no other rights than to come in with other creditors of Summerfield, and have his debts existing at the time of the purchase paid *pro rata* with the other creditors. In *Avery* v. *Hackley*, 20 Wall. 407, (22 L. Ed. 385,) it is held that a "valid lien is not devested by the mere fact of the holder of it subsequently taking a transfer of the equity of redemption made to him with a view of giving to him a preference, and in violation of the bankrupt act." See, also, *Johnson* v. *Riley*, 41 W. Va. 140, (23 S. E. 698).

Sixth assignment is by A. J. Bennett,—that it was error to invalidate, as an illegal preference, the assignment from A. H. Summerfield to him of an order for five hundred and eighty-five dollars and sixty-eight cents on William Whitmer & Sons, in part payment of a *bona fide* debt then due from Summerfield to Bennett, which order was for money due from William Whitmer & Sons to Summerfield for lumber sold them; that said Bennett acted in good faith, without knowledge of any insolvency on the part of Summerfield, and wholly without intent to hinder, delay, or defraud any creditor of said Summerfield. Defendant Summerfield was indebted to Bennett in the sum of nine hundred and eighty-nine dollars and sixty-eight cents. This amount was paid to Bennett by the said order on Whitmer & Sons, and the transfer of stock and other personal property aggregating said amount of nine hundred and eighty-nine dollars and sixty-eight cents. The court set aside the preference given to Bennett as illegal, as to his whole claim, and placed the same on a footing with all simple-contract creditors, to be paid *pro rata* and decreed against

Bennett, to be paid to all the creditors the said sum of nine hundred and eighty-nine dollars and sixty-eight cents. notwithstanding the last provision of section 2, chapter 74, Code, as amended by the Acts of 1895, which reads: "Provided, further, that nothing in this section contained shall be taken to effect any transfer of bonds, notes, stocks, securities or other evidences of debt in payment of or as collateral security for the payment of a *bona fide* debt or to secure any endorser or surety, whether such transfer is made at the time such debt is contracted or endorsements made, or for the payment or security of a pre-existing debt." The *bona fides* of the claim of Bennett is not questioned in the cause. It is claimed by the appellee that the order given by Summerfield to Bennett was not such a transfer of notes, bonds, stocks, securities, or other evidences of debt in payment of, or as collateral security for the payment of, a bona fide debt, as is protected by said provision. The form of the order is not given in this case, but the presumption is that it was an order in writing for the payment of the amount of money mentioned in the order. It is reported by Commissioner Baker, and referred to as "one order on Whitmer & Sons, five hundred and eighty-five dollars and sixty-eight cents;" and Summerfield, in his answer, says "that his sale of the personal property mentioned to A. J. Bennett, and the assignment of the order of five hundred and eighty-five dollars and sixty-eight cents to Wm. Whitmer & Sons, was made in good faith, and for valuable consideration, to-wit, the payment of the sum of nine hundred and eighty-nine dollars and sixty-eight cents in the aggregate, which respondent then justly owed said Bennett," etc.; and Bennett, in his answer, says: "In payment in full of which amount (nine hundred and eighty-nine dollars and sixty-eight cents) the said A. J. Bennett received from said A. H. Summerfield as follows: Order on William Whitmer & Sons for five hundred and eighty-five dollars and sixty-eight cents; one lot of about fifty thousand feet of mostly mill culls and cull white-oak boards," etc. 17 Am. & Eng. Enc. Law, 224, defines an order as "a brief note, resembling a single bill of exchange, requesting the payment of money or the delivery

of personalty to the bearer of the note. * * * There is a prima facie presumption that there was a valuable consideration for drawing an order." And it is there further said that "an order drawn upon sufficient consideration cannot be revoked, whether accepted or not," and in the absence of an acceptance is such an evidence of debt that an action will lie thereon against the drawer, and after acceptance by the drawee an action will lie against him. *Child* v. *Moore*, 6 N. H. 33; *Jolliff* v. *Higgins*, 6 Munf. 3; *Curle* v. *Beers*, 3 *J. J. Marsh*, 170. An account is assignable, and under section 14, chapter 99, Code, the assignee can maintain any action thereon in his own name, without the addition of "Assignee," which the original payee might have brought. It was evidently the purpose of the lawmakers to permit the transfer and assignment of debts or indebtedness in any shape that it could be assigned in payment of, or as collateral security for the payment of, a *bona fide*, debt, etc. The evidence is that the order made by Summerfield on William Whitmer & Sons was taken, together with the other property transferred at the same time, in full payment of Summerfield's indebtedness to Bennett. An assignment of an account or an order to one who owes the account, to pay the amount due to the drawer, or any specific part of it, to the payee in the order, is such a transfer of an evidence of debt as will be protected by the last proviso in section 2, chapter 74, Code.

Seventh: Appellants "join in assigning as error the decree of February 1, 1898, in that it sets aside a sale made by Summerfield to J. W. Heltzel, and the resale of the property conveyed, at a less price, and at the cost of the insolvent estate, although Heltzel fully admits that he knew of the insolvency of Summerfield at the time of the purchase. Sales made by Summerfield to others who were innocent purchasers were, on the other hand, confirmed to them against their protest." The bill of plaintiff prayed for the setting aside of the deed to Heltzel, and that the property be sold, and the proceeds applied to the several creditors of the defendant A. H. Summerfield *pro rata*. Defendant Heltzel failed to answer or put in an appearance. The bill was taken for confessed as to him, and on the 1st day of February the decree was rendered setting aside the sale

to Heltzel, and the deed conveying to him the one hundred and fourteen acres and the one-sixth of three hundred and twenty-five acres of land, and providing for the sale of said land for the benefit of all the creditors. It is true, it sold at the sale under the decree for less than the price for which Summerfield had sold it to Heltzel. But the creditors having stood by and permitted the decree to be entered by default, and then continued to stand by and permit it to be sold for about one-half the price Heltzel was to pay for it, without taking any steps to prevent it, it seems to me they are hardly in position to complain of the error of the court. True, appellants Lukins and Bennett did, together with defendant Kerens, at the May term, 1898, of the court, file an exception to the report of Commissioner Baker, filed at the same term, because the reports of said commissioner failed to charge said Heltzel with the specific execution of his contract in the purchase of the one hundred and fourteen acres and the one-sixth of three hundred and twenty-five acres of land. The reports seem to be responsive to the decrees referring the cause to him. He reports the fact of the said sale of the land to Heltzel, but it nowhere appears that he was required by any party in interest to make any specific report in regard to it, no question having been raised before him. The sale to Heltzel was set aside and a decree for a resale rendered on February 1st, 1898, and the judicial sale was begun on the 2d day of May, —the day fixed in the advertisement,—and for want of bidders was adjourned to May 6th, when it was sold at public auction, and the sale confirmed at the same term. No objection was made to the sale or its confirmation. But the exception to the report of Commissioner Baker was indorsed some time during that term in May,—exact date not given. The creditors had the benefit of a public sale of the property to apply to their debts, and it could not be known very well until the sale was made whether it was better for the creditors to set aside the sale to Heltzel and resell the property, or to have held the sale to Heltzel valid.

For the reasons herein stated, the decree of February 1st, 1898, in so far as it overrules the demurrer to plaintiff's bill, and decides the defendant A. Summerfield to be

insolvent as early as the first of January, 1897, and sets aside the sale to Heltzel, and confirms the sales to Kerens and Bennett, and decrees the sale of the one hundred and fourteen acres and one-sixth undivided interest in the three hundred and twenty-five-acre tract, and the decree of May 7th in so far as it confirms the sale of the one hundred and fourteen acres and the one-sixth of the three hundred and twenty-five acres to J. M. Harper, are confirmed, and in all other respects the same are reversed and set aside; and the decree of May 14th, 1898, is reversed and set aside, and the cause remanded for further proceedings to be had therein.

Modified.

CHARLESTON.

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MOORE *et al. v.* JENNINGS *et al.*

Submitted June 17, 1899,—Decided November 28, 1899.

1. EXTRACTING OIL—*Irreparable Injury—Equity Injunction.*
   The unlawful extraction of oil or gas from land, they being part of the land, is an act of irreparable injury, and equity will enjoin it. (p. 191).

2. PARTIES—*Reversal.*
   Where proper parties are not properly before the court, the decree will be reversed, and the cause remanded for further proceedings. (p. 189).

3. LESSORS AND LESSEES—*Owners Necessary Parties.*
   When the lessors and lessees of one tract of land bring their suit against the lessees of an adjoining tract, to enjoin them from trespassing upon the plaintiff's premises, and from continuing to drill a well for oil and gas which defendants had commenced, as plaintiffs claim, on their premises, and praying in their bill that the boundary line between

the tracts claimed by the parties respectively be ascertained, fixed, and determined; that plaintiffs be decreed to be the owners of the land on which said well had been located by the defendants, and of all the oil and gas which could or might be obtained through said well; that the defendants be decreed to have no estate, right, title, or interest whatsoever of, in or to said land, or said oil or gas, nor any right whatsoever to the possession of said land or said well,—*held*, in such case, all the owners of the fee of both tracts are necessary parties to the suit, to enable the court to settle the rights of all parties interested or affected by the subject-matter in controversy. (pp. 188-191).

Appeal from circuit Court, Tyler County.

Bill by E. H. Jennings and others against Clint Moore and others. Judgment for plaintiffs, and defendants appeal.

Reversed.

CHARLES T. CALDWELL, OKEY JOHNSON, and MCDOUGLE & JOHNSON, for appellants.

W. P. HUBBARD and WELL & THORG, for appellees.

MCWHORTER, JUDGE.

On the the 1st day of April, 1897, E.. H. Jennings, J. G. Jennings, R. M. Jennings, H. W. Richardson, S. C. Wells, D. H. Cox, Sarah Tustin, Minerva Tustin, Mary J. Woodburn, Noah Woodburn, Samantha Tustin, and Sarah Tustin, guardian of Emma Tustin, John Tustin, and Sarah Tustin, filed in the clerk's office of the circuit court of Tyler County, against Clint Moore, Henry Rauch, L. M. Gorham, J. F. Hall, and C. Hall, defendants, their bill in chancery, with an order of injunction indorsed thereon by Hon. H. C. Hervey, judge of the First circuit, according to the prayer of the bill. The bill alleges that the plaintiffs the Tustins and Woodburns are the owners in fee of a tract of one hundred and two acres, more or less, of land described in the bill, situate in Ellsworth district, Tyler County; that they were in full, peaceable, and lawful possession thereof; that on the 1st day of March, 1896, a legal and valid lease for oil and gas was executed by the said Sarah Tustin in her own right, Minerva Tustin, Mary J. Woodburn, Noah Woodburn, Samantha Tustin, and Sarah Tus-

tin as guardian of Emma, John, and Sarah Tustin, to plaintiffs H. W. Richardson and S. C. Wells, who subsequently by deed conveyed the full equal and undivided one-half interest in said lease to D. H. Cox, which lease is exhibited with the bill; that said Richardson, Cox, and Wells entered into an agreement with plaintiffs E. H., J. G. and R .M. Jennings whereby it was agreed that in consideration of one undivided one-half interest in said lease said Jennings would drill an oil or gas well upon said tract of land; that in pursuance of said agreement they located and drilled a well upon said premises, "which produced oil in paying quantities, and made the premises and adjoining property very valuable for oil or gas purposes;" that adjoining said tract belonging to the Tustin heirs is another tract of two acres, more or less, known as the "Arnett Lot," part of a tract or parcel known as the "J. S. Haught Tract," containing thirteen and one-half acres; that defendants Clint Moore, Henry Rauch, and L. M. Gorham held what purported to be a lease for oil and gas upon the said Arnett tract of two acres; that by virtue of said lease they entered upon and proceeded to develop said two-acre lot for oil and gas purposes, and made the location at which said well for oil and gas should be bored; that, while said location was pretended to be upon said two-acre tract, in truth and in fact it was upon said Tustin tract, and not upon the Arnett lot of two acres; that in making said location defendants were trespassing upon the premises owned and controlled by, and upon the rights and privileges of, plaintiffs that defendants shortly after making the location aforesiad were notified that they had located said well upon the tract or parcel of land owned and controlled by plaintiffs, and that defendants were trespassing thereon, yet notwithstanding said notice said defendants, contrary to law, and in violation of the rights of plaintiffs, proceeded to erect the necessary wood rig, a large portion of which is situated on the lands of plaintiffs, and to drill at said location and upon plaintiffs' land a well for oil and gas; that frequently during the progress of said drilling additional notices were given to defendants that they were drilling said well upon said Tustin farm, and upon the premises owned and controlled by plaintiffs, but that notwithstand-

ing such repeated notices defendants continued to prosecute the drilling of said well; that said well is located and drilled by defendants upon the premises of plaintiffs without legal right and authority, and without the consent of plaintiffs, and if the drilling of said well should be completed it would be of great and irreparable damage to plaintiffs; that defendants had been advised by their own surveyor, and had admitted, that said well was on the land and premises of plaintiffs. It further alleged that if the well should be completed, and prove to be productive of oil or gas, plaintiffs would be unable to operate it, although on their premises, for the reason that it was located so near the boundary of their premises that they would be unable to erect the necessary wood rig with which to further operate the well, and that the loss and damage would be irreparable and almost incalculable; and alleged the insolvency of defendants, and that plaintiffs were without adequate remedy at law; and prayed that defendants, their agents and employes, might be enjoined and restrained from trespassing upon their said premises, from drilling said well any deeper, and from completing the same, and from doing and performing any work or labor of any kind whatever thereon, or entering thereon for any purpose, and for general relief. On the 31st day of March, 1897, an injunction was granted as prayed for in the bill, to take effect on bond being given in the penalty of two thousand dollars. On the 8th day of May, 1897, defendants Clint Moore, Henry Rauch, L. M. Gorham, J. F. Hall, and C. Hall filed their demurrer to plaintiff's bill, alleging, for grounds of demurrer, that it was not sufficient in law, and that interested and proper persons, as shown by the bill, had not been made parties to the suit or bill, and for other reasons appearing on the face of the bill, but not stated. On the——of May, 1897, plaintiffs filed an amendment to their bill, sworn to on the 18th of May, 1897, making Kora Queen a party thereto, and adding prayer to their bill as follows: "And your orators further pray that the said Clint Moore, Henry Rauch, L. M. Gorham, Kora Queen, J. F. Hall, and C. Hall be made parties defendant to this bill of complaint, and for process to issue ,and that the boundary line between

the said Tustin farm and Arnett lot be ascertained, fixed, and determined; that your orators be decreed to be the owners of the land upon which said well has been located by the defendants as herein above set forth, and of all the oil and gas which can or may be obtained through said well; that the defendants be decreed to have no estate, right, title, or interest whatsoever of, in, or to said land or said oil or gas, nor any right whatsoever to the possession of said land or said well; and that the defendants and their agents and employes be enjoined, inhibited, and restrained from trespassing upon said land of your orators, from entering thereon for any purpose whatsoever, from obtaining or taking any oil or gas from, out of, or through said well, and from selling or disposing of any oil heretofore obtained by them out of said well, and from setting up any claim, right, or title of, in, or to said land or said well, or the oil or gas heretofore obtained or which may hereafter be obtained therefrom; and for such other and further relief as their case may require, and as to a court of equity may seem just and right." On the 19th of May, 1897, defendant L. M. Gorham filed his demurrer to plaintiffs' bill, as being not sufficient in law, and not entitling plaintiffs to the relief prayed for, nor to any relief, and for other reasons appearing on the face of the bill. Also, on the same day, defendants J. F. and C. Hall filed their joint demurrer for the same reason, and because sufficient and proper persons interested in the subject-matter of the suit had not been made parties. On the 19th of May, 1897, defendants Clint Moore and Henry Rauch, not waiving their demurrer, filed their joint answer. On the same day the defendant L. M. Gorham, without waiving his demurrer, filed his answer. And on the same day the defendants J. F. Hall and C. Hall, not waiving their demurrer, filed their joint answer.

The following stipulation was filed on the 21st day of May, 1897: "And now, May 21st, 1897, it is agreed by and between the solicitors for the complainant and defendants: That the affidavits filed by each party be considered and treated as depositions, the same as if said witnesses had so testified under rule to take deposition regularly, and that this hearing upon the motion to dissolve the injunc-

tion shall be a final hearing, and the court shall at the next term enter its final decree upon the prayers of the bill in accordance with the evidence presented. If the court shall be of the opinion that the injunction should be dissolved, the order of dissolution may be entered at any time. And that the demurrers of defendants and their answers shall be taken and considered as though filed at rules regularly, and this case heard as if the cause had been regularly set for hearing. P. A. Shanor and Leo. Well, solicitors for Pl'ffs. R. L. Gregory and C. T. Caldwell, Solicitors for Def'ts." And the cause was heardon that day, and the court took time to consider the same, and on the 5th day of July, entered its final decree, overruling the demurrers and the motion to dissolve the injunction, and perpetuating the same, overruling defendants' objection to the filing of the amendment to the bill of complainants, and decreeing that the plaintiffs E. H. Jennings, J. G. Jennings, R. M. Jennings, H. W. Richardson, S. C. Wells, and D. H. Cox were the owners of the lease hold on which said well was located, and were entitled to all the oil or gas which had been, could be, or might be, obtained through said well, and that the defendants have no estate, right, title, or interest whatsoever of, in, or to said well, or said oil or gas, nor any right or title to the possession of said well or oil or gas, and that said defendants should forthwith deliver the same to the said parties entitled thereto, and that said defendants pay the costs. On the 13th day of July, 1896, defendants moved the court to set aside the said decree "for the reasons: * * * Errors appearing on the face of said decree, in overruling objection to amended bill filed, and because said decree is contrary to the law and equity in the case,"—which motion the court overruled, and to which ruling defendants excepted. From which decree defendants were granted an appeal to this court, and, among others, assigned the following errors: "First. The court erred in overruling the demurrers to the bill of complaint. (1) Because Emma, John, and Sarah Tustin, infants ,were not made parties to the bill; and, further, because there is nothing in the bill showing who they are infants of. (2) A suit by a guardian is invalid. (3) A suit by an infant can only be brought

in the name of the next friend. (4) The court erred in not sustaining the demurrer to said bill for want of necessary parties defendant thereto, to-wit, Charles Arnett and wife, grantors of the defendant, grantees named in the bill. (5) The court erred in not sustaining the demurrer to the bill because the bill fails to make defendant's lease an exhibit, and because it does not disclose who the owner of the Arnett lot is. (6) The court erred in not sustaining the demurrer to the bill because of the variance between the allegations in the bill and Exhibit A filed therewith. (7) The court erred in not sustaining the demurrer to the bill and dismissing the same on the ground that the plaintiffs had an adequate remedy at law. (8) The court erred in not sustaining the demurrer because it is not shown in the bill in what way or manner the Tustins became owners of any lands, and because there is no allegation in the bill showing what interest, if any, plaintiffs Woodburn had therein."

Appellees insist that appellants are not prejudiced by the overruling of the demurrer, and therefore cannot complain, and cite *Clark* v. *Johnson*, 15 W. Va. 804, where it is held: "It is not sufficient, to reverse a decree, that there is error in it. The error must be prejudicial to the appellant, or it will not be reversed on his application." Also, *Handy* v. *Scott*, 26 W. Va. 710, where it is held that "an appellate court will not reverse a decree at the instance of a party not prejudiced by it," and contend that appellants could not possibly be prejudiced by the absence of Arnett, the lessor of appellants, and the infant Tustins, who were represented by plaintiff Sarah Tustin, their guardian, and also claiming that no one can demur for defect of parties to an action, unless his own interest requires that the defect should be cured, and cite *Newbould* v. *Warrin*, 14 Abb. Prac. 80, and *Hillman* v. *Hillman*, 14 How. Prac. 456, where it is held that it is only where the defendant has an interest himself in another being made a defendant that he can demur for want of parties, and it must appear that his interest requires that such other parties should be made defendants before he can demur. I confess that when I first wrote this case I failed to see what interest the appellants could have in Arnett being a party to the bill,

and could not see that they could possibly be interested in having the infant Tustins as plaintiffs; but when we reflect that Arnett is the lessor of appellants, they hold under him, and are liable to him for rents and royalties, he is directly interested with them,—he in the fee, and they in the leasehold,—he is a necessary party, that he may not only defend his own interests, but defend the title under which they (his lessees) hold. Although Arnett was used as a witness in the case, not being a party to the suit, he would not be bound by any decree that might be entered; and the matters involved would not be settled fully by a decree affecting his rights, and none could be rendered adversely to the defendants without affecting his interests prejudicially. In *Gregory* v. *Stetson*, 133 U. S. 579, 10 Sup. Ct. 422, 33 L. Ed. 792, it is held, "A circuit court can make no decree in a suit in the absence of a party whose rights must necessarily be affected thereby." As to the infant Tustins, under the original bill I should not consider them necessary parties. But plaintiffs filed an amendment to their bill which materially changed the whole purpose of the suit. They ask permission to amend their bill by making Kora Queen a party defendant thereto, which is done, without, however, making an allegation against him, or stating in their said amendment or bill any reason for so making said Queen a party, or showing in any way that he had any interest in the matter in controversy, either directly or indirectly; and they add to their bill a prayer as hereinbefore set out. This prayer goes much further than that in the original bill, which was simply to prevent a trespass, while the amendment involves the title to the real estate of the infants, as well as all the parties to the suit, and others not parties, as it seeks to ascertain, fix, and determine the boundary line between the Tustin farm and the Arnett lot, and prays that plaintiffs be decreed to be the owners of the land upon which said well had been located by the defendants, and of all the oil and gas from said well, and that the defendants be decreed to have no estate, right, title, or interest in said land or well, nor any right to the possession of either. To accomplish this an action at law would be the proper legal remedy, but equity, having taken jurisdiction, will go on to do complete justice,

though in so doing it have to try title, and administer remedies which properly belong to courts of law. *Yates* v. *Stuart's Adm'r*, 39 W. Va. 124, (19 S. E. 423); *Bettman* v. *Harness*, 42 W. Va. 433, (26 S. E. 271), 36 L. R. A. 566. In *Burlew* v. *Quarrier*, 16 W. Va. 108, it is held that: "All persons materially interested in the subject of the controversy ought to be made parties in equity, and, if they are not, the defect may be taken advantage of either by demurrer or by the court at the hearing. It is not necessary, although more regular, that want of parties should be made either by plea, answer, or demurrer. On the contrary, if it appear on the face of the record that proper parties are wanting, the decree will be reversed, unless the objection was expressly relinquished in the court below." *Sheppard's Ex'r* v. *Starke*, 3 Munf. 29; *Clark* v. *Long*, 4 Rand. 451; *Armentrout's Ex'rs* v. *Gibbons*, 25 Gratt. 371; *McArthur* v. *Scott*, 113 U. S. 340, 5 Sup. Ct. 652, 28 L. Ed. 1015; *Hagan* v. *Wardens*, 3 Gratt. 315; *Hitchcox* v. *Hitchcox*, 39 W. Va. 607, (20 S. E. 595); *Donahue* v. *Fackler*, 21 W. Va. 125. In *Crickard* v. *Crouch's. Admr's* 41 W. Va. 503, (23 S. E. 727), it is held, "When proper parties are not properly before the court, the decree will be reversed, and the cause remanded for further proceedings." *Turk* v. *Skiles*, 38 W. Va. 404, (18 S. E. 561). Whether the infant Tustins were necessary parties or not, under the frame of the original bill and its prayer, their interest in the oil and gas in the land being all that was involved in the suit, and that having by the decree of the circuit court been placed in the hands of their guardian, either to receive in kind or collect the purchase money, they became necessary parties in the proceeding to fix the boundary line between the land in which they are part owners and the Arnett lot. And Arnett is also a necessary party to the proceeding, being the owner of the fee in the Arnett lot. This being true, no proper decree could be rendered in the cause in the absence of such parties. In *California* v. *Southern Pac. Co.*, 157 U. S. 229, 15 Sup. Ct. 591, 39 L. Ed. 683, it is held that "when an original cause is pending in this court, to be disposed of here in the first instance, and in the exercise of an exceptional jurisdiction, it does not comport with the gravity and the finality which should characterize such an

adjudication to proceed in the absence of parties whose rights would be in effect determined, even though they might not be technically bound in subsequent litigation in some other tribunal." *Wilson* v. *Kiesel* 164 U. S. 248, 17 Sup. Ct. 124, 41 L. Ed. 422; *New Orleans Waterworks Co.* v. *City of New Orleans*, 164 U. S. 471, 17 Sup. Ct. 161, 41 L. Ed. 518; *Story* v. *Livingston*, 13 Pet. 359, 10 L. Ed. 200; *Conn* v. *Penn*, 5 Wheat. 424, 5 L. Ed. 125. "The want of proper parties to a bill is a good defense in equity, — at least, until the new parties are made, or a good reason shown why they are not made. At law a plea of the like nature is sometimes a good defense in bar, and is sometimes only a matter in abatement. But the plea of equity is of a far more extensive nature than at law, and it often applies when the objection would not at law have the slightest foundation. * * * But courts of equity frequently require all persons who have remote and future interests, or equitable interests only, or are directly affected by the decree, to be made parties; and they will not, if they are within the jurisdiction, and capable of being made parties, proceed to decide the cause without them. * * * It is the great object of courts of equity to put an end to litigation, and to settle, if possible, in a single suit, the rights of all parties interested or affected by the subject-matter in controversy." 2 Story, Eq. Jur. § 1526. See, also, Story, Eq. Pl. § 72. "A person may be affected by the demands of the plaintiff in a suit, either immediately or consequently. Where a person is in the actual enjoyment of the subject-matter, or has an interest in it, either in possession or expectancy, which is likely either to be defeated or diminished by the plaintiffs' claims, he has an immediate interest in resisting the demand, and all persons who have such immediate interests are necessary parties to the suit; but there may be other persons, who, though not immediately interested in resisting the plaintiff's demands, are yet liable to be affected by them consequentially, because the success of the plaintiff against the defendants who are immediately interested may give those defendants a right to proceed against them for the purpose of compelling them to make compensation, either in the whole or in part, for the loss sustained. The persons who are con-

sequentially liable to be affected by the suit must frequently also be made parties to it." 1 Daniell, Ch. Pl. & Prac. 246. Appellees, in referring to the claim of appellants that Arnett and wife, grantors of appellants, ought to be joined with them as defendants to the bill, say: "This assignment is based on an erroneous view that underlies the whole view of the case which the appellants entertain. They evidently consider this a proceeding to determine the title to the fee, as the equivalent of an action of ejectment, as brought to determine the legal title to the land. If the bill were of this nature a demurrer might well lie to it, for equity would have no jurisdiction." I must say the bill as amended by the prayer is of that nature, when it prays that the boundary line between the two tracts be "ascertained, fixed, and determined," and that plaintiffs be decreed to be the owners of the land upon which the well in controversy has been located by the defendants, and of all the oil and gas which can or may be obtained through said well, and that the defendants be decreed to have no estate, right, title, or interest therein, or to the possession of said land or well. Such a decree as is there prayed for would surely settle the rights of parties to the suit, not only to the use of the well, but in the fee to the land in question; and, to settle the boundary line between two tracts of land, certainly the owners of both tracts should be parties to the proceeding.

Appellants say the demurrer should have been sustained because appellees have an adequate remedy at law. Plaintiffs allege insolvency of defendants, and it is well settled that "equity has jurisdiction by injunction to prevent acts of irreparable injury to land, even though there is a controversy as to title between the parties." "The unlawful extraction of petroleum, oil, or gas from land (they being part of the land) is an act of irreparable injury. Equity will enjoin it. *Bettman* v. *Harness*, *supra*.

It is insisted by appellees that by the stipulation of submission of the cause in the circuit court the appellants waived their demurrers. It is true the stipulation on their part could almost be said to be a reckless agreement; but it does not waive the demurrers, but provides, among other things, that the demurrers of the defendants shall be taken

and considered as though filed at rules regularly, etc. The demurrers were before the court for consideration. In *Hill* v. *Proctor*, 10 W. Va. 59 (Syl., point 6), it is held that, "if it appear on the face of the record that the proper parties are wanting, the decree will be reversed by the appellate court, unless the objection was expressly waived in the court below." In the case at bar the demurrers were not expressly waived, nor even by implication. They were submitted to the court for consideration. Appellees contend that a demurrer for want of parties must name the necessary parties who have been omitted, so as to enable the plaintiff to amend his bill, and cite *Robinson* v. *Dix*, 18 W. Va. 528, where it is held that the demurrant should name the necessary parties who have been omitted; but it is further held in the same syllabus that the court ought in the final hearing of the cause, though the demurrer has been overruled, to decline to determine the cause on its merits until the necessary parties defendant have been brought before the court by an amendment of the bill, and have been given the opportunity to be heard. Appellants say it was error in not dissolving the injunction and dismissing plaintiffs' bill. "When a bill has equities in it, it should not be dismissed for defect of parties until the refusal of plaintiff to bring them in." For the reasons herein stated the decree should be reversed and set aside, and the cause remanded to the circuit court of Tyler County, that the proper parties may be brought before the court, that there may be a complete settlement of all the matters in controversy in this cause according to the principles and rules of equity.

Reversed.

CHARLESTON.

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McGREGOR *et al. v.* CAMDEM *et al.*

Submitted June 17, 1899—Decided December 2, 1899.

1. NUISANCES—*Oil and Gas Wells.*
   Oil and gas wells are not nuisances per se. Whether they are nuisances to a dwelling house and its appurtenances depends on their location, capacity, and management. (p. 197).

2. OIL AND GAS WELL—*Abatable Nuisance.*
   When such a well has such capacity, management, and location with regard to a dwelling house and its appurtenances as to materially diminish the value thereof as a dwelling, and seriously interfere with its ordinary comfort and enjoyment, it is an abateable nuisance. (p. 196).

3. UNLAWFUL OPERATION—*Enjoined.*
   If there is any way that such well can be operated so as not to make it such nuisance, only the unlawful operation thereof will be enjoined. (p. 200).

Appeal from Circuit Court, Ritchie County.

Action by Matilda McGregor and others against Thomas B. Camden and others. From a decree dismissing the bill, plaintiffs appeal.

Reversed.

HALL & HALL and B. F. AYERS, for appellants.

CAMDEN & MOSS, for appellees.

DENT, PRESIDENT,

Matilda McGregor et al. against Thomas B. Camden et al., from the circuit court of Ritchie County; being an appeal from a decree dismissing a bill praying an injunction against an oil and gas well. The facts are as follows: The plaintiffs are the owners of a valuable lot and dwelling house and appurtenances, alleged to be worth about ten thousand dollars, situated in the town of Cairo, said county. The lot is highly improved for the purposes for which it had been used for the past twenty-five years, to wit, as a

home for the McGregor family. Mrs. McGregor now occupies the same as a life tenant, while the remainder is in her children, joint plaintiffs in this suit, but who have married and live elsewhere. Adjacent to this property is another lot eighty-five by one hundred and fifteen and a half feet, on which certain of the defendants began sinking an oil well in the year 1896, within seventy feet of the dwelling house, and about fifty feet of the line of the lot, towards such house, and fifteen feet in another direction to the McGregor land. The plaintiffs obtained a temporary injunction in its early beginning to restrain the sinking of the well so close to their property. This injunction was afterwards modified so as to permit the defendants to proceed with their well on giving bond in the penalty of ten thousand dollars, good for the period of forty days. The plaintiffs then filed an amended bill, making new parties, and amending the allegations in some respects, and obtained a virtual reinstatement of their injunction, to be affective after the expiration of the forty day bond limit. Some of the defendants tendered answers, to which the plaintiffs excepted. Some of the defendants have as yet filed no answers. On the 26th day of January, 1897, the following vacation order was entered of record, to-wit: "Notice having been given by the defendant J. H. Kelly of a motion to dissolve the injunctions and orders of injunction made in this cause on the original and amended and supplemental bills, to be heard on January 14, 1897, and the plaintiffs having given notice of a motion to reinstate the injunction on the original bill filed in this case, which notice was accepted by B. M. Ambler, of counsel, on behalf of J. H. Kelly and others, owners of the lease covering the lot on which is located the well in controversy, which motions were noticed to be heard at Harrisville on the 14th day of January, 1897, and the parties having by a stipulation in writing agreed that the argument on the questions presented should be heard before the undersigned judge, for greater convenience, at Parkersburg, at 306 Juliana street, that stipulation is ordered to be made part of the record, and to be copied on the chancery order book as a part of this order; and the motions aforesaid coming on to be heard upon the orders and proceedings heretofore had,

and upon the amended and supplemental bill, and upon certain depositions taken by the plaintiffs, and upon the demurrer and answer of the defendant J. H. Kelly to the amended and supplemental bill, and upon exceptions to the answers of J. H. Kelly and others indorsed thereon by plaintiffs, and upon the motions to dissolve said orders of injunction at the instance of the defendants, and to reinstate the injunction of the original bill, and the court having heard the arguments of the counsel, according to the stipulation, on the matters arising in the record, it is now, on this 22d day of January, 1897, at New Martinsville, and within the circuit of which the undersigned is judge, ordered that the order of injunction entered in this cause upon the amended bill by the Hon. Thos. P. Jacobs, late judge of said circuit, be, and the same is hereby, dissolved and set aside, and the court refuses to reinstate the injunction on the original bill, and overrules the exceptions to the answer of J. H. Kelly and others, and that the defendants be, and are hereby, relieved from all orders of injunction heretofore entered in the cause. Romeo H. Freer, Judge 4th Judicial Circuit." And on the 9th day of March, 1897, the bills were dismissed at the costs of the plaintiffs.

There are numerous technical objections urged in this cause that are hardly worthy of consideration. One is that the original bill was not properly verified. Section 3, chapter 133, Code, provides that "no injunction shall be awarded in vacation nor in court in a case not ready for hearing, unless the court or judge be satisfied by affidavit or otherwise of the plaintiff's equity." Whatever satisfies the judge of plaintiff's equity is sufficient, whether the bill be sworn to or not. The judge being satisfied, no one else can object. Such objection after the injunction is granted can amount to nothing but a mere legal quibble. The main facts on which the bill is founded are not even denied the only controversy between the parties being the question as to whether a gas and oil well can be so sunk and operated as not to be a nuisance to a dwelling house and lot within seventy feet of it. The bare statement of the case would apparently make it prima facie a nuisance. The noise and rumbling of steam-running machinery at all hours, both day and night, until they become accus-

tomed to it, would be a great source of annoyance to most persons; and then the inflammable, destructive, and dangerous character of both oil and natural gas issuing from a producing well, and discharged in the air or stored in quantities, are matters of common understanding; and when situated so near a dwelling house and grounds as to become an impending and threatening danger to the property and inmates thereof, so the proper enjoyment of such property is greatly interferred with, if not entirely destroyed, a court of equity is justified in abating the same as a nuisance, unless it appears that such well can be operated without danger to such dwelling house. Nor can this matter be determined by waiting until the property is actually destroyed. Such delay would be in its nature criminal. A lawful business cannot be a nuisance per se, but from its surrounding places and circumstances, or the manner in which it is conducted, it may become a nuisance. *Manufacturing Co.* v. *Patterson*, 148 Ind. 414, 47 N. E. 2, 37 L. R. A. 381; *Powell* v. *Furniture Co.*, 34 W. Va. 804, (12 S. E. 1085.), 12 L. R. A. 53; *Kinney* v. *Keopmann*, (Ala.) 22 South. 593, 37 L. R. A. 497; *Wilson* v. *Manufacturing Co.* 40 W. Va. 413, (21 S. E. 1035). The last case refers to the keeping and manufacturing of powder near a public place. In the case of *McAndrews*, v. *Collerd*, 42 N. J. Law, 189, it is held that "keeping powder, nitroglycerine, or other explosive substance in large quantities in the vicinity of a dwelling house or other places of business is a nuisance per se, and may be abated by action at law or bill in equity." This is quoted approvingly by Judge Brannon in the case of *Wilson* v. *Manufacturing Co.*, above cited. In the case of *Cook* v. *Anderson*, 85 Ala. 99, 4 South. 713, it was held that "keeping explosive substances in large quanties in the vicinity of dwelling houses or places of business is ordinarily regarded a nuisance,—whether or not being dependent upon the locality, the quantity, and surrounding circumstances." If the keeping of such substances, which necessarily include oil and natural gas, near a dwelling house or place of business, may be a nuisance what may be said of boring into the earth, and turning them loose from their safe confinement, and allowing them to spread ad libitum over and through a dwelling house?

Natural gas is known to be easily ignitable, and highly explosive, and to be very dangerous, owing to its stealthy and rapid approach. Naphtha gas, arising from crude petroleum oil, is said to be more explosive than powder. In this case we have the natural gas from the well, petroleum, and the gas therefrom in its storage tank, all to deal with as dangerous and threatening to plaintiffs' property. As the drilling has ceased, the noise attending it has, likewise, except that arising from the pumping operation, about which nothing is alleged or proven.

The bills, on demurrer, make out a strong case of nuisance against the defendants, and therefore the demurrer should have been overruled. They do not allege, however, that this well cannot be operated without danger or loss to plaintiffs' property, although there are allegations from which this might be implied. Nor is this a matter of common knowledge, as there is little, if any, human experience to be had in this direction, as but few oil wells have ever been located in so close proximity to a valuable home property. The evidence of the most expert and competent witnesses could alone shed light on this subject. The court cannot say without such evidence that the well could be operated without such danger and loss. The drilling of oil and gas wells is not only a legitimate business, but public policy upholds it, as being for the general welfare. *Uhl* v. *Railroad Co.* (decided at this term) (34 S. E. 934). Yet public policy itself is qualified by the constitutional provision that private property shall not be taken or damaged for public use without just compensation. So public policy will not justify the maintenance of an oil well that is a nuisance to private property. The defendant Kelly, who appears to answer for all the defendants, admits many of the allegations of the bill, denies that it has so far damaged the plaintiffs' property to any considerable extent, alleges that the well "is a paying well, and is now being operated with all the prudence, care, and skill known in the business," but does not claim that such well can be so operated as to prevent any appreciable danger to plaintiff's property from fire and gas. The proofs appear to establish the fact that the well and tank are an impending evil, continually hanging over the plaintiffs' property,

—as much so as the storage or manufacture of powder in quantities could possibly be,—and that it is in danger of destruction by fire by day and by night. There are no waterworks or fire protection of any kind, and if fire once got under headway it would be impossible to stop it until stayed by the entire destruction of all plaintiffs' buildings, and, if in the night-time, probably life itself. It is a hardship to stop the pursuit of any lawful business, and equity does not do it except in a plain case. If the business is merely for pecuniary profit, and threatens loss to another which cannot be compensated in damages, such as the destruction of an old, established home, the speculator has no right to complain because he is restrained from doing acts lawful in themselves, but which become unlawful because they ruthlessly interfere with the long-established rights of his neighbor. He must use his own without damaging his neighbor.

From the vacation order recited, it is hard to tell on just what state of the pleadings the circuit court decided this case. It was submitted on bill and demurrer thereto, answers of J. H. Kelly tendered, and exceptions thereto, affidavits and depositions, and motion to dissolve the injunction. If the judge regarded the answers as though replied to generally, and read the plaintiffs' depositions, a good *prima facie* case for injunction was made out, and the injunction should have been continued to the hearing; but, if he regarded the answers in without replication, then, in so far as they controvert the bill, they must be taken as true, and would be decisive of the case, for the depositions could not be considered in opposition to the admission of the truth of the answer. 2 Tuck. Bl. Comm. 479. It is there said: "If the plaintiff does not reply to the answer, but the cause is set down for hearing upon bill and answer, without replication, the answer is to be taken in all things as true." "In injunction cases, as we have said, the defendant may file his answer the day before the commencement of the term, and move even the next day for dissolution. Here the motion may come on without replication, but the answer is to be taken and considered as if there was a replication." In this case the plaintiffs never had an opportunity to reply to the answers, for the judge

acted upon them at the same time he overruled the exceptions thereto, all of which was done in vacation, in the absence of both plaintiffs and defendants. It must therefore be presumed that the judge considered such answers as though put in issue by general replication. Looking at it in this light, the only proofs in the case are those taken by the plaintiffs. From these it appears that the defendants' oil well has already scattered oil and salt water and gas over and through plaintiffs' premises; that she has already had to put out all her fires twice on account of the danger from gas (once being notified so to do by defendants' employes), and these things are liable to occur again at any time; that the defendants are storing oil from the well in an ordinary oil tank within eighty feet of such dwelling; and that the danger of fire therefrom is imminent and threatening. The plaintiffs could hardly prove any more without waiting until their buildings and property were destroyed, and then bring that in as proof positive that a nuisance once existed, but this would be too late for relief by injunction. Plaintiffs' proofs undoubtedly made a prima facie case of nuisance, which entitled them to have the injunction continued until a final hearing.

Attention is called to the use of the phrase "if any," so often repeated in the bill. This refers solely to the salt water, and is used for the reason that plaintiffs did not know whether salt water was or would be present or not in the output of the well. There is much immaterial matter contained in the answers, which rather prejudice the defendants in a court of equity than otherwise. They claim that the well is necessary to secure the oil and gas under the eighty-five by one hundred and fifteen and a half feet of ground, worth about four thousand dollars. That this is false, the defendants established themselves, by locating their well within fifteen feet of the line of the McGregor land. Nor was any such attempted misleading allegation necessary, for the reason that, while oil and gas in place are regarded as real estate, yet, being fugitive in nature, they are not the absolute property of the landowner until he reduces them to possession, and they become the property of him who first lawfully makes this reduction. They are the property of the landowner in the earth, just as the

air and water are his above the earth. And his neighbor has just the same right to drill an oil or gas well as he has to dig for water or erect a windmill on his own land. *Uhl* v. *Railroad Co.*, above cited. There are two questions of fact to be finally decided in this case: First. Is this oil well, as now operated, such a nuisance to the plaintiffs' property as to materially diminish the value thereof as a dwelling, and seriously interfere with the ordinary comfort and enjoyment of it? *Adams* v. *Michael*, 38 Md. 123. The burden of establishing this is on the plaintiffs. Second. Is there any way in which this well can be operated so as not to materially diminish the value of the property as a dwelling, and seriously interfere with the ordinary comfort and enjoyment of it? If there is, equity will permit it to be so operated, but enjoin the continuance of the unlawful operation. As to these questions, the court at the request of either party, or on its own motion, may direct an issue to be tried by a jury. Section 4, chapter 131, Code; *Powell* v. *Furniture Co.*, 34 W. Va. 804, (12 S. E. 1085), 12 L. R. A. 53. The principles involved in this case are too important, both to the public and property owners, to be disposed of without due hearing and careful consideration. The final decree dismissing the bills and the order dissolving the injunction are reversed, and the injunction reinstated; and the case is remanded to the circuit court for completion of the pleadings, and a final hearing and disposition on the merits according to the rules and principles governing courts of equity.

Reversed.

CHARLESTON.

McCOY *v* JACK.

Submitted June 22, 1899—Decided December 2, 1899.

1. PARTNERSHIP DEBTS—*Equity.*

If partners give a bond, each signing only as individuals, but it is in fact for a partnership debt, though at law it is an individual debt, yet in equity it is treated as a partnership debt. (p. 202).

2. DISSOLUTION OF FIRM—*Creditors.*

Though partners dissolve, one of them assuming the debts, and this is known to a creditor, yet the creditor retains still the right to treat all the partners as principals, not as sureties, unless such creditor agrees to look only to the one assuming the debts. (p. 203).

3. ADMINISTRATOR'S LIABILITY—*Time of Payment.*

An administrator cannot pay, within twelve months after his qualification, one debt in full, or in excess of its ratable share of assets, over another of the same class, either with or without notice of such other debt; and, if he does, he is personally liable to the omitted debt for its share of money applied in such payment. If such payment be made after twelve months, he is not liable, unless he had notice of the other debt. (p. 205).

Appeal from Circuit Court, Gilmer County.

Bill by John C. McCoy against W. H. Jack and others. Decree for complainant, and defendant Jack appeals.

Affirmed.

JAMES B. FOWLER and R. F. KIDD, for appellant.

LINN & WITHERS, and DULIN & HALL, for appellee.

BRANNON, JUDGE:

McCoy brought a suit in chancery in the circuit court of Gilmer County against Jack, as administrator of Corley and in his own right, to convene the creditors of Corley's estate, to enforce a judgment in favor of McCoy against Corley and others, rendered in Corley's lifetime, and sub-

ject assets of Corley's estate to his debts, and to set aside as fraudulent as to McCoy's debt a conveyance from Corley to Jack for a lot in Cedarville, and subject it to the debts. McCoy's judgment was against Corley, Ross, Dyer, and Tomkins upon a bond for one thousand dollars, given by them as individuals; but it was shown that it was for goods purchased of John O. McCoy & Sons by Corley & Ross, partners, Dyer signing as surety. This firm of Corley & Ross was dissolved afterwards, Ross agreeing to pay its debts; a fact known to McCoy, but about which he was not consulted, and in which he took no part. Jack, as administrator of Corley, paid some debts in full, and McCoy claimed that he was personally liable to him for his debts' ratable share of the assets of Corley used in their payment, Corley being insolvent, his assets being sixty-five dollars and a life policy of one thousand dollars. Dyer, as surety, paid some on the McCoy debt, and claimed substitution to McCoy's rights against Corley's estate. A decree held Corley's estate liable for McCoy's debt, canceled the deed from Corley to Jack, and subjected the lot to McCoy's debt, and held Jack liable personally for McCoy's share of the money, which he had applied to pay certain debts in full, and gave Dyer substitution for what he had paid. Dyer gave notice to McCoy to sue, when Tomkins agreed to go on the bond to avoid suit in consideration that no suit be brought, and Dyer withdrew his notice to sue. It seems Corley knew nothing of this. Jack, as administrator and in his own right, appealed.

Is Corley a surety of Ross or a co-principal with him? The consideration inuring to the benefit of Corley and Ross, the bond is treated in argument as one of the firm though it bears no sign of firm liability, it being a plain, individual bond. A query came to me whether it could be treated as a firm debt. T. Pars. Partn. § 141, says that such a note is not a partnership note, and has not that effect. For some purposes, even in equity, it may not have, but, while an individual debt at law, if shown in equity to be in fact a partnership debt, it is so treated. 1 Bates. Partn. §§ 452, 453; *Woolen Co.* v. *Juillard*, 31 Am. Rep. 488. The question is not material in the decision of this case, as in both views Corley is a principal; only it may

add strength to the claim of McCoy that, as to him, Corley is a principal in fact and in form of contract.

It is contended, to relieve Corley of liability, that, as the firm was dissolved, and Ross assumed all firm liabilities, McCoy knowing this, the relations of the parties changed, in this: that afterwards Corley was only a surety for Ross, not only as between him and Ross, but as between him and the creditor McCoy; and that, when McCoy gave further indulgence for payment, without consent of Corley, Corley was released. As will be seen in the case of *Johnson* v. *Young*, 20 W. Va., 657, some cases hold that on such a state of facts the retiring partner is thereafter a surety, and a creditor would have to so treat him, as, for instance, to recognize his demand for suit against his former partner, or not to extend time for payment. But in *Barnes* v. *Boyer*, 34 W. Va. 303, (12 S. E. 708), that doctrine is not followed, but it is held that on such dissolution and agreement of one to pay debts, though the creditor know of this arrangement, "he retains unimpaired all the rights and remedies against both parties as principals, as before dissolution." I cannot see why the clear vested right of the creditor to hold both parties liable as principals can be destroyed by the mere act of the partners, unless he not merely knows of the arrangement, but agrees thereafter to treat the one as principal, the other as surety. The able, clear opinion of Judge Lucas in that case tells me there is no necessity of my pursuing the subject further. Corley being a principal, it is not necessary to discuss the worn question of the sufficiency of the indulgence to release Corley if he had been a surety.

It is plain that the court did not err in holding the lot in Cedarville liable for McCoy's debt. A conveyance of it was made by Jack to Corley. The deed gives the consideration as "one dollar and other valuables in hand paid." Jack says that, as Corley had rendered faithful service as a clerk in his store, he conveyed the lot to Corley, without his knowledge, as a recognition of past faithfulness, and a stimulus to like service in the future. On this Jack would erect a trust by which Corley should hold the lot for Jack's use, and thus, not being Corley's property, it would not be liable for his debt; but the reply is that no

such consideration is expressed in the deed, and, if it were, it would work no result, since, treating it as only a gift, Jack could not revoke it, and recall the full title and ownership conferred by the deed. No express trust is claimed. Corley accepted this conveyance. Being thus owner, Corley, on the very day when the writ was served upon him in the action for this debt, which would destroy him financially, conveyed the lot back to Jack, falsely stating the consideration as four hundred and seventy-five dollars, when Jack says he paid nothing, and Jack did not know of the execution of the deed for some time afterwards, and had no contract for its conveyance, and Corley took the deed to the office for record, and requested the clerk to note the hour of its admission to record, and paid the fee. Jack was the friend of Corley, close and trusted; Corley being his store clerk. Of course, this act was only that of Corley to screen his property from McCoy, and the decree properly subjected it to McCoy's debt. If we say Jack did not know of the debt, and was guilty of no fraud, he cannot hold the lot for nothing. The conveyance was voluntary.

It is assigned as error that the decree erred in giving Dyer substitution to the rights of McCoy for money Dyer paid to McCoy on the debt. How error? Nobody denies that Dyer was Corley's surety, and paid money for him. The theory is that Dyer notified McCoy to sue on the bond, when Tomkins, as the friend of Ross, agreed to sign the bond if Dyer would recall his notice to sue, which he did, McCoy agreeing to indulge; and that, therefore, Dyer must look alone to Ross and Tomkins, not to Corley, his principal. I cannot discern how the coming in of this new surety could destroy Dyers' right to look to Corley for his indemnity.

There is nothing in the point that McCoy must first get his money from Dyer and Tomkins before going against Corley's estate. The converse is true: that he should first exhaust the estate of the principal before going upon Dyer and Tomkins, who are only sureties of Corley.

Objection is made to the decree because it holds that Jack, as administrator, could not pay certain debts in full, leaving McCoys' debt to go unpaid; but that it was entitled

to its share of assets so used. At common law the administrator could prefer one debt over another of the same class, if none have sued. 1 Lomax, Ex'rs, 407. But long ago, in Virginia, a statute changed this by requiring application of assets to demands in prescribed order, denying the right to pay a debt of one order before another of higher order, and provided that, after debts of the United States government, taxes, and fiduciary debts, all other demands, save voluntary ones, shall be paid ratably. *Id.* 411; Code, c. 85, ss. 25, 26. The Code says that, if the administrator, after twelve months from the qualification, pays a debt, he shall not be liable for any other debt unpaid, unless he has notice of it. The common law was that he was not liable for paying out of order unless he had notice of the unpaid debt, but this provision changes that rule, and makes the adminstrator liable if he pays within twelve months, notice or not. If he does so within that time, he acts at his peril. After that the common law rule operates. He is then only liable if he has notice. Jack paid these debts in full within twelve months, and was properly held liable to this debt for its *pro rata* share. The evidence shows he had notice of this debt before such payments, if that were material.

Affirmed.

Note by BRANNON, Judge. There is no foundation to say that, when the firm was dissolved, and Ross agreed to pay its debts, McCoy assented to look only to Ross. Therefore, plainly, under *Barnes* v. *Boyers*, 34 W. Va. 303, (12 S. E. 708), Corley remained a principal debtor to McCoy. The note was dated 1st of March, 1888, payable two years after date. The firm of Corley & Ross was dissolved August 29th, 1888. In March, 1891,—nearly three years after that dissolution,—Tompkins signed the note as additional surety. The proposition, then, in defense of Corley, must be that the taking of Tomkins as additional surety operates to release a principal debtor, Corley. That is the proposition simply. I need cite no law that such act would not alone work such release. It could not hurt Corley. Extension of time would not release him, because he was not a surety. Such a release as that mentioned, based on the mere taking of an additional surety, is not made in the pleadings, the whole theory in the pleadings being that Corley became surety under the assumption by Ross of the partnership debts. So, if there were proof that when McCoy accepted Tomkins as additional surety, he agreed to release Cor-

ley, such release would not operate for want of a pleading. But there is no proof that McCoy agreed to release Corley. He flatly denied it, and it is not proven. Moreover, if McCoy had so agreed, would there be any consideration going from Corley to bind Jack? It was simply another man signing the old note as surety, at Dyer's request, to allay his fear of loss from his suretyship. If the intent was to end the old note, or release any party on it, why did they not make a new note? Then it would have been a surrender and prima facie release of the old note. *Bank* v. *Good*, 21 W. Va. 455; *Hess* v. *Dille*, 23 W. Va. 90. But there was no surrender of the old note. Jack still held it. That is strong to show there was no design to release. It was simply the signing of the old note by an additional surety. That is all there is of it.

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CHARLESTON.

HITCHCOX v. MORRISON *et al.*

Submitted June 19, 1899—Decided Dec. 2, 1899.

1. EQUITY JURISDICTION—*Adverse Title.*

A court of equity has no jurisdiction to settle title to real estate between adverse claimants unless the plaintiff has some equity against the party claiming adversely to him. An equity against other persons will not give such jurisdiction. (p. 214).

2. TITLE—*Cloud—Possession—Equity.*

Those only who have a clear legal and equitable title to land, connected with actual possession, have a right to claim the interference of a court of equity to give them peace, or dissipate a cloud on their title. (p. 214).

3. COMMISSIONER'S SALE—*Deed—Color of Title.*

A deed made by a special commissioner in a chancery cause, under a decree confirming the sale, purporting to convey the real estate described in the deed, gives color of title in the

grantee, notwithstanding irregularities in the proceedings in such cause and sale. (pp. 214-215).

Appeal from Circuit Court, Ritchie County.

Action by Victor V. Hitchcox, by his next friend, against William L. Morrison and others. Decree for defendants, and plaintiff appeals.

Modified.

DAVE D. JOHNSON, for appellant.
DAVIS & WOOD, for appellees.

MCWHORTER, JUDGE:

William Hitchcox made his will, dated the 20th day of July, 1867, devising all his real estate to Phoebe Hitchcox, his wife, for and during her natural life; remainder in equal shares to his children, Michael M., William L., Waldo P., Nicklin K., and Florence P. Hitchcox. The last named died intestate and without issue, so that the remainder went to the four brothers. Michael M. became involved. His creditors obtained judgments against him, and instituted suit in chancery to subject his lands to the liens of their judgments. During the pendency of the suit, Michael M. Hitchcox died. After his death another suit was instituted against his widow and heirs at law for the same purpose, The suits were consolidated. A reference was had to a commissioner to ascertain and report of what real estate said M. M. Hitchcox died seized and possessed, and the liens thereon. A decree for the sale of his lands was entered ,and the lands sold by a special commissioner. Among the lands so sold was the undivided one-fourth of a tract of two hundred and ninety-three acres which was devised through the said will of William Hitchcox, at which sale A. S. Core became the purchaser of the said undivided one-fourth part of said two hundred and ninety-three acres, at the price of six hundred and fifty dollars. The sale was reported to the court, and duly confirmed by decree entered in said causes on the 24th day of April, 1877. After the confirmation of said sale, the purchaser, A. S. Core, filed his bill in the circuit court of Ritchie County against W. L. Hitchcox, Waldo P. Hitchcox, and Nicklin K. Hitchcox, the owners

of the other three-fourths of said tract of two hundred and ninety-three acres (sometimes designated as two hundred and eighty-two acres), for the partition of said tract of land. On the 26th of April, 1878, a decree was entered in the cause appointing commissioners to partition the tract between the four owners thereof. On the 2d of October, 1878, the commissioners filed their report of partition, and lot No. 2, described by meets and bounds, containing eighty and three-fourths acres, was set apart and assigned to A. S. Core, the plaintiff; and on the 29th day of the same month of October a decree was entered confirming said report of commissioners of partition, and assigning in severalty to each of said four owners the parcels of land as described and set out by the metes and bounds in said report; assigning to A. S. Core his said lot No. 2, containing eighty and three-fourths acres, and the lots Nos. 1, 3, and 4 to the other holders, respectively; and appointing R. S. Blair a special commissioner to make, execute, and acknowledge a deed with special warranty to each of such parties for their respective interests as described in said report and also in said decree. On the 19th day of May, 1879, said A. S.Core, by agreement in writing, sold his said tract of eighty and three-fourths acres so purchased by him, but thereafter described as containing eighty-two acres, to William L. Morrison and John M. Morrison, who went into possession soon after the said purchase, by agreement, and about the 1st of September, 1879, began to clear up the land and build a dwelling house on it; and the said William L. Morrison moved in it and made his home there. The land, when they purchased it, was still "in the woods." Another house was built on the eighty-two acres later, the same fall, which was occupied several years by Isaac L. Morrison, a brother of William L.; and after he left it, Frank Baldwin moved into it. William L. has lived there ever since he went onto the land, the 1st of September, 1879, clearing and improving the land. On the 29th day of March, 1882, A. S. Core and C. M. Core, his wife, conveyed said eighty-two acres of land to said Willam L. Morrison and John M. Morrison, in consideration of one thousand, one hundred dollars in hand paid, with general warranty. On the first Monday in September, 1887, Vic-

tor V. Hitchcox, a minor child of the deceased, M. M. Hitchcox, suing by his next friend, Ellen A. Hitchcox, filed his bill in the said circuit court of Ritchie County against the widow of said M. M. Hitchcox and his brothers and sisters, the other heirs at law of said decedent, and the owners of the other three-fourths of said two hundred and ninety-three acres, and also making said William L. Morrison and John M. Morrison defendants; alleging that the said heirs at law of said M. M. Hitchcox were the owners of an undivided one-fourth of said tract, and that said widow was entitled to dower therein, and that they, as such owners, were entitled to have a partition of said tract and further alleging that said Morrisons were in possession of a portion of said land, and asserting some sort of a claim to an interest therein, and charging that they had no right, title, or interest therein; that on the 22d of October, 1888, there was placed on record in the county court clerk's office of said Ritchie County what purported to be a deed from R. S. Blair, special commissioner, to one A. S. Core, and purporting to convey an undivided interest in said land, but that no sale of said land or any interest therein was ever decreed in any legal proceedings set up in said pretended deed, no legal sale of said land or any interest therein was ever made by said Blair, special commissioner, or otherwise, and neither said land nor any interest therein was ever embraced or contemplated in the legal proceedings mentioned in said pretended deed; and praying that the Morrisons be required to disclose and show by what right or authority they were asserting possession to any part of said land or any interest therein, and the character of title they claim; that the said pretended deed of conveyance made by Special Commissioner Blair to Core, and the conveyance by Core to Morrisons, be declared null and void, and of no effect to create any title or interest in said Morrisons, or otherwise, to said land; and for the partition of said tract among the parties entitled thereto. J. M. and W. L. Morrison answered the bill, setting up their title from A. S. Core to the eighty-two acres, and their possession thereunder.

On the 31st of October, 1892, the court entered a decree in accordance with the prayer of the bill, removing the

deeds from Blair, special commissioner, to Core, and from Core to Morrisons, as cloud upon the title of plaintiffs, and appointing commissioners to partition said tract of two hundred and ninety-three acres, giving the widow and heirs at law of M. M. Hitchcox the one-fourth thereof. The commissioners reported, adopting the partition theretofore made in the suit said A. S. Core prosecuted for that purpose; giving to the said heirs of M. M. Hitchcox the same lot or portion which was in possession of said Morrisons. From which decree the Morrisons appealed to this court (20 S. E. 595), and the decree was reversed for want of parties,—the court holding that A. S. Core, under whom the Morrisons were holding, and from whom they derived their title, was a necessary party,—and the cause was remanded to the circuit court; and in the said cause in the circuit court, on the 21st day of June, 1895, it was suggested that the plaintiff, Victor V. Hitchcox, had arrived at the age of twenty-one years, and had also departed this life; and suggesting also, the death of his next friend Ellen A. Hitchcox; and Columbia V. Hitchcox, the mother of said plaintiff, and Clay B. Hitchcox and others, heirs at law of said Victor V. Hitchcox, tendered their amended bill, which upon their motion was ordered to be filed, and the same was remanded to rules, with leave to sue out process thereon. Summons was duly executed as to the defendants William L. Morrison, John M. Morrison, the widow and heirs of M. M. Hitchcox, deceased, J. P. Strickler, Will A. Strickler, T. E. Davis, and Joab Martin, executors of A. S. Core, A. C. Blair, Lizzie Blair, R. S. Blair, Jr. Jane F. Martin, L. E. Pratt, Ella C. Tabler, D. C. Tabler, and C. M. Core. The amended bill refers to and makes the original bill a part of the amended bill, and recites the decree of partition, and removal of the cloud of title of Core and the Morrisons from plaintiffs' title, the appeal of the Morrisons, and reversal of the decree; alleging that the widow of William Hitchcox, to whom he devised said land for life, died on the———day of July, 1877, and that said M. M. Hitchcox died April 21, 1874; that none of the children of William Hitchcox had any interest in said tract of land, except in reversion, until after the death of the widow, and at her death the said two hun-

dred and ninety-three acres reverted in fee to W. L. Hitchcox, Waldo P. Hitchcox, and Nicklin K. Hitchcox, each a one-fourth, and to the heirs of M. M. Hitchcox an undivided one-fourth interest; that, at the time of the alleged proceedings to subject to sale the real estate of M. M. Hitchcox to pay his debts, neither he while living, nor his heirs after his death, had any interest in said land, except the said reversionary interest, and that the suits for the purpose of selling the lands of M. M. Hitchcox, and of his estate after his death, were instituted, the decree of sale rendered, and sale made, and confirmation of sale to A. S. Core,—all occurred prior to the death of the widow of William Hitchcox, so that neither said M. M. Hitchcox while living, nor his heirs at law after his death, had any interest in said land, other than their said reversionary right; that the heirs of M. M. Hitchcox had been joint tenants with the owners of the other portions of said land ever since the death of the widow of said William Hitchcox, deceased, and as such joint tenants they had never been lawfully ousted of their right and interest therein, nor deprived of their right of possession thereof; that not until the 3d of June, 1882, did the heirs of M. M. Hitchcox have any notice, actual or constructive, that any other person or persons whatsoever claimed the said interest in said land; that the recording of said pretended deed from A. S. Core to said Morrisons was the first legal constructive notice that any other claim was made upon said land; that said A. S. Core had no deed or paper title of any character whatever prior to the year 1888, and in fact never had any valid deed therefor; that said Core died August 11, 1888, and the pretended deed from R. S. Blair, special commissioner, to said Core was not made or executed until after Core's death, so there was no evidence of any claim or title whatsoever, or record, against said interest in said lands owned by said M. M. Hitchcox heirs until June 3, 1892; that said heirs were not parties to the proceedings of Core for the partition; that they had no notice thereof, and in no wise were affected by the partition proceedings, but they were and still are the co-tenants in every part and parcel of said land with the said Waldo P., Nicklin K., and William L. Hitchcox, and their assignees,

and said heirs were not and could not be, in law, affected by said proceedings, so as to devest them of their interest in any part of said land, nor to set off a certain portion thereof, to be held by A. S. Core or any other person, to them; that, in order to constitute an adverse possession, there must be some color or show of title in the person setting up such possession, of a character to constitute some sort of a paper title, of which notice should be given, either actual or by recordation, to the person whose possession is sought to be ousted; that there was no pretended possession, other than as co-tenants, until after March, 1882; that none of the decrees made in said pretended partition proceedings were recorded, and no deed was ever made or recorded in said partition proceeedings; that the title of said heirs is valid and indefeasible to the one undivided fourth part of said two hundred and ninety-three acres, and they have never been devested thereof, nor has there been any legal adverse possession sufficient to oust them of their right of possession thereto; that Nicklin K., Waldo P., and William L. Hitchcox, the original owners of undivided interests in said two hundred and ninety-three acres under the will of William Hitchcox, are now all dead; that the interest of Nicklin K. is owned by defendants J. P. Strickler and Will A. Strickler; that the interest of Waldo P. is now owned by J. B. Pratt and Lee Pratt; that the interest of William L. Hitchcox is also owned by J. B. and Lee Pratt. And they pray that their amended bill may be filed in said original cause of Victor V. Hitchcox against Columbia V. Hitchcox and others; that the suit be revived, etc.; that the parties named, including the executors, widow, and heirs of A. S. Core, the widow and heirs of M. M. Hitchcox, the said Morrisons, and the present owners of the other interests in said two hundred and ninety-three acres, be made defendants to the amended bill, and that they be required to answer the same as well as the original bill; and for the relief asked for in the original bill, the removal of the cloud, and the partition of the land.

At September rules, 1895, summons returned executed as to defendants J. S. Pratt, Margaret Reitz, and L. G. Reitz, and decree *nisi* as to them; and J. M. and W. L.

Morrison filed their demurrer to amended bill, in which plaintiffs joined. Bill taken for confessed, and cause set for hearing as to other defendants served with process at August rules. On the 6th of November, 1895, the demurrer was argued and overruled, and leave granted defendants to answer the bill within thirty days from the rising of the court. On the 5th of March, 1896, the cause was revived on said amended bill, and ordered to be proceeded in, in the name of said plaintiff's in the amended bill, the heirs at law of said Victor V. Hitchcox, deceased; and defendants John M. Morrison and William L. Morrison tendered their joint answer to the amended bill, which was filed, and Thomas E. Davis and Joab Martin, administrators of A. S. Core, also tendered their answer to said amended bill, which was filed, and plaintiffs replied generally to both of said answers. Said Morrisons, in answering, adopted their answers to the original bill so far as applicable; admitted the decree, their appeal, and reversal of decree by the Supreme Court; and denied the material allegations of the amended bill; pleaded the suits of Rosenheim against M. M. Hitchcox, and P. T. Jeffreys against the M. M. Hitchcox heirs, and the partition suit of Core, in bar; and pleaded the statute of limitations of ten years and five years, and their failure to correct the decrees, if void, within five years, and that the proceeds of the sale of the one-fourth interest were applied to the payment of the debts of M. M. Hitchcox's estate. The defendants Thomas E. Davis and Joab Martin, executors of A. S. Core, also filed their answer. Depositions were taken and filed by both plaintiffs and defendants, and on the 10th day of September, 1896, the cause was submitted upon the papers formerly read, the proofs taken in cause upon the amended bill, the answers, and general replications thereto, and bill taken for confessed as to other defendants served with process, and arguments of counsel, when it was decreed that the plaintiffs were not entitled to the relief prayed for; and the original and amended bills were dismissed, and costs awarded the defendants Morrisons and Core, executors, against plaintiffs, from which decree plaintiffs appealed.

This is a suit, the prime object of which is to remove

cloud from plaintiffs' title. Evidently the proceeding for partition is merely used for jurisdictional purposes. "The jurisdiction takes its rise in the doctrines of *quia timet*, in order to give repose and peace to the party in possession by virtue of a rightful claim or title against him who might vex and harass with suits after the right had been fairly tested in a court of law, or against a deed or other evidence of title which had been fraudulently obtained, and which might be set up after the evidence which could manifest its true character had become obscure or had passed away." *Huntington* v. *Allen*, 44 Miss. 654. In *Orton* v. *Smith*, 18 How. 263, 15 L. Ed. 393, it is said: "Those only who have a clear legal and equitable title to land, connected with possession, have a right to claim the interference of a court of equity to give them peace or dissipate a cloud on the title." And in *Frost* v. *Spitley*, 121 U. S. 553, 7 Sup. Ct. 1131, 30 L. Ed. 1012: "The bill cannot be maintained without clear proof of the possession and legal title. A person out of possession cannot maintain such a bill, whether his title is legal or equitable; for, if his title is legal, his remedy at law, by action of ejectment, is plain, adequate, and complete. And, if his title is equitable, he must acquire legal title, and then bring ejectment." In *Stuart's Heirs* v. *Coalter*, 4 Rand 74: "A court of equity has no jurisdiction to settle the title and bounds of land between adverse claimants, unless the plaintiff has some equity against the party claiming adversely to him. An equity against other persons will not give such jurisdiction." Plaintiffs have no equity against the defendants John M. Morrison and William L. Morrison, who have been in the actual possession of the whole interest claimed by plaintiffs in the two hundred and ninety-three acres of land. From the time they took possession, in 1879, that possession was open, notorious, exclusive, adverse, and hostile, and under "color of title," In *Mullan's Adm'r* v. *Carper*, 37 W. Va. 215 (16 S. E 527) (Syl. point 1), it is held that "any written instrument, however defective or imperfect, and no matter from what cause invalid, purporting to sell, transfer, or convey title to land, which shows the nature and extent of the party's claim, constitutes color of title, within the meaning of the

law of adverse possession." And in *Swann* v. *Thayer* 36 W. Va. 46, (14 S. E. 423) (Syl., point 2): "A deed purporting to convey land in fee under a void sale, made under a deed of trust, by a trustee having no legal authority, gives color of title." *Swann* v. *Young*, 36 W. Va. 57, (4 S. E. 426). The question arises upon the demurrer whether John M. Morrison and William L. Morrison are proper parties to this suit, and whether they can be compelled to remain parties, and have their rights adjudicated in a court of equity, as in the case of *Carberry* v. *Railroad Co.*, 44 W. Va. 260, (28 S. E. 694), where the plaintiffs were claiming the original right, unaffected by the sale of the land as forfeited to the state, while the railroad company was claiming under a proceeding adverse to plaintiffs' title; selling it as forfeited and lost to them by their default in paying the taxes. In that case JUDGE BRANNON, in his opinion, says: "There is no ligament of community of interest between them. The plaintiffs' counsel argues that the bill makes, not the case of a substantial adverse title, but it represents the claim of the company as so thin as to be a pretended title. But it has body enough to suggest to the plaintiffs the necessity of bringing it before the court to have it dispelled as a cloud, and it must therefore have an entity sufficient to call it an adverse title. If a nonentity, why bring it in? And, besides, the allegation that it originated under a sale of a court as forfeited lands tells us that it is a title of sufficient substance to warrant us in treating it as a conflicting title." The judge further says: "It is needless to expand here upon the proposition that equity will not entertain a bill which is but an action of ejectment, and thus try adverse title, unless it be incidental to relief under a known head of equity jurisdiction. It is, however, claimed that the court has jurisdiction for partition, and, as incidental to its exercise, will settle all questions affecting the legal title, under section 1, chapter 79, Code 1891, and so try titles entirely adverse. If so, the adverse claimant, having no community of interest with the other party, and being in no view a co-tenant, but standing out on his own independant right, denying all right in his adversary, and that adversary confessedly having no right to a mere share in the other's ownership, but

to all, if to anything, is deprived of his right to a jury trial under that clause of the constitution saying that no one shall be deprived of his property without judgment of his peers. Next to a trial for life or liberty, the jury right is most essential and sacred in a legal proceeding to take away a man's freehold,—his home and castle,—as of inferior title. The statute never was intended to subject a stranger, an enemy, to the right under which partition is sought, to a loss of this jury trial. Where there is conflicting claim to share in the land under the same right under which partition is sought, and the determination of the conflict is merely incidental to the partition, the statute applies, and gives the court power to decide such conflict. That is not a case of claims utterly hostile, each demanding, not a share, but the whole; one alone entitled to the whole. That is not partition. Such is this case. I ask, as Judge Tucker asked in *Lange* v. *Jones*, 5 Leigh, 195, what equity have plaintiffs against the railroad? There is no common *seisin* between them. I will not dwell further upon the construction of this statute, as I gave my construction of it in *Davis* v. *Settle*, 43 W. Va. 17 (26 S. E. 557-561). See *Pillow* v. *Improvement Co.*, 92 Va. 144 (23 S. E. 32)." I have quoted from the opinion in the *Carberry Case* thus extensively because in the case in hand it applies as well as to the case in which it was written. It seems to be well settled, as stated in point three of the syllabus in the case quoted from, that "a court of equity, under its jurisdiction to remove a cloud over the title to land, will not entertain a bill by a plaintiff who has only constructive, but not actual, possession." *Davis* v. *Settle*, 43 W. Va. 17 (26 S. E. 557); *Moore* v. *McNutt*, 41 W. Va. 695 (24 S. E. 682); *Clayton* v. *Barr*, 34 W. Va. 290 (12 S. E. 704). In *De Camp* v. *Carnahan* 26 W. Va. 839 (Syl, point 2), it is held that "a court of equity has a right to cancel a deed which is a cloud upon the title of one out of possession of the land." But in that case the jurisdiction was sustained upon the ground of partition, the equities existing between the parties to the suit, the defendant, the St. Lawrence Boom and Manufacturing Company having the title to the residue of the property, seven-twelfths, while the plaintiff had title to five-twelfths; and the court,

having jurisdiction for partition, would pass on the title incidentally to the relief. The syllabus, standing as it does as an abstract proposition of law, is not in accord with a long, unbroken line of decisions of Virginia and West Virginia, and is somewhat misleading. The final decree in the case at bar shows that the cause was heard on its merits, and the bills dismissed. The court not having the jurisdiction to grant the relief prayed for, and it being held that: "A decree, on full hearing, dismissing a bill generally, without reservation of right to the plaintiff to sue at law, is conclusive upon all the matters involved in the case, even though there was no jurisdiction in equity because of adequate remedy at law. Unless it otherwise appears from the decree, it will be taken that the dismissal was upon a hearing of the merits" (Carberry v. Railroad Co., supra),—the decree should be amended by adding, "but such dismissal is without prejudice," and with such modification the decree is affirmed.

Affirmed.

CHARLESTON.

HAYS *v.* FRESHWATER *et al.*

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Submitted June 8, 1899—Decided December 2, 1899.

1. EXECUTORS—*Surcharging Accounts—Laches.*

J. M. C., by his last will and testament, appointed two executors, who qualified, and entered upon their duties, and made the first settlement of their accounts on the 13th of December, 1883, and the second settlement on the 16th of June, 1888. After the death of one of the executors, H,. one of the distributees under said will, at October rules, 1894, filed her bill to surcharge and falsify said accounts. The

laches of plaintiff are so great in the circumstances that the relief prayed for will be denied. (p. 219).

2 WILL—*Construction.*

The cardinal rule for the construction of a will is to ascertain the intent of the testator from the entire instrument. (p. 223).

3. ADVANCEMENTS—*Interest—Distribution.*

Where a testator, in his will, makes advancements to his children, and directs that they shall be charged interest thereon, it is proper to charge such interest in making distribution of his estate. (p. 225).

Appeal from Circuit Court, Hancock County.

Suit by Virginia B. Hays against E. A. Freshwater and others. Decree for plaintiff, and defendant Freshwater appeals.

Affirmed.

JOHN R. DONEHOO and MELVIN & EWING, for appellant.

PALMER & THOMAS, for appellee.

ENGLISH, JUDGE,

On the 27th day of April, 1878, James M. Campbell, of Butler, Hancock County, West Virginia, made his last will and testament, and appointed his brother, George W. Campbell, and his son-in-law, E. A. Freshwater, executors thereof, and on December 1, 1880, he added a codicil thereto. After the death of said James M. Campbell, said executors qualified, and gave bond, and took upon themselves the duties attending the administration of said estate, and continued to act as such executors jointly until some time in the year 1890, when said George W. Campbell died, and R. H. Campbell and Howard N. Campbell were appointed and qualified as his executors. After the death of said George W. Campbell, nearly all of the business connected with the settlement of the estate of said James Campbell was transacted by said E. A. Freshwater, surviving executor of said last will and testament. On the 13th of December, 1883, said George W. Campbell and E. A. Freshwater made a settlement of their accounts as such executors before a commissioner of the county court of Hancock County, finding a balance due said estate as of September 17, 1883, of one thousand, three hundred and

forty dollars and eighteen cents, which report was unexcepted to, and was, on the 4th day of February, 1884, confirmed by the county court of said county. Said executors again made a settlement of their accounts before the same commissioner on the 16th day of June, 1888, who found a balance due said executors of five dollars and seveny-four cents. On the first Monday in October, 1894, Virginia B. Hays, a daughter and legatee of said James M. Campbell, filed her bill in the circuit court of Hancock County, having for its object a settlement of the accounts of E. A. Freshwater as surviving executor of said James M. Campbell, and of R. H. and Howard N. Campbell, executors of the last will and testament of George W. Campbell, deceased, to surcharge and falsify the accounts of E. A. Freshwater and George W. Campbell which had been settled before a commissioner, and to recover such balance as might be found in the hands of the said surviving executor, R. H. and Howard N. Campbell, executors ot said George W. Campbell, deceased, and seeking a construction of said will. To this bill the appellant E. A. Freshwater, as executor of James M. Campbell, filed his demurrer, claiming therein that so much of said bill as sought to surcharge and falsify said first settlement of accounts made by said executors was barred by the laches of the plaintiff, more than ten years having elapsed between the date of said settlement and the commencement of this suit; and also demurred to so much of said bill as relates to said second settlement, because more than six years had elapsed between the date of said second settlement and the commencement of this suit; and for other reasons assigned,—which demurrer was overruled, and the defendants were ruled to answer. On the 5th of December, 1874, said Freshwater, executor, as aforesaid, filed his separate answer to complainant's bill, claiming therein that the plaintiff was barred by her laches from surcharging and falsifying either of said accounts settled as aforesaid, and assigned other reasons why the plaintiff's bill could not be maintained, and put in issue the material allegations of the plaintiff's bill. R. H. and Howard N. Campbell executors of George W. Campbell, also filed their answer, relying on the laches of the plaintiff, stating various reasons

why the plaintiff's bill could not be maintained, and putting in issue the material allegations of the plaintiff's bill. On the 24th of July, 1895, the cause was heard upon the bill and answers together with the papers theretofore filed. The court, proceeding to construe said will, held that the plaintiff was entitled to have the accounts of E. A. Freshwater and George W. Campbell, executors, and the accounts of E. A. Freshwater, surviving executor, restated and settled to conform to the construction placed upon said will by said decree, and directed that the cause be referred to a commissioner of the court to restate and settle said accounts, with leave to either party to surcharge and falsify the settlements of the accounts as already made by said executors. In pursuance of this decree an account was taken, and reported to the court, which was excepted to by said executors for various reasons, and on the 11th of April, 1896, a decree was entered in said cause sustaining some of the exceptions to said report and overruling others, ascertained the sums which it considered properly chargeable to the devisees of James M. Campbell as advancements, and also the amount which the plaintiff, Virginia B. Hays, was entitled to as a devisee of James M. Campbell; also found the balance in the hands of E. A. Freshwater, executor, on November, 1893, was two thousand one hundred and forty dollars and seventy-five cents, and directed that, so far as the said R. H. and Howard N. Campbell, executors, as aforesaid, should pay the amounts therein recovered by Virginia B. Hays and Hannah G. Miller, or either of them, they, the said executors of George W. Campbell, should be reimbursed, and recover against said E. A. Freshwater, not exceeding the sum of two thousand one hundred and forty dollars and seventy-eight cents, and interest thereon from the 15th of November, 1893; and from this decree the defendant Freshwater, executor, etc., obtained this appeal.

The first error assigned and relied upon by the appellant is claimed to have been in the action of the court in its decree of November 15, 1894, overruling appellant's demurrer to the plaintiff's bill: First, because the settlement made in 1883 by appellant and his co-executor was regular, and regularly confirmed, and, having remained un-

challenged for more than ten years before the institution of this suit, plaintiff was barred by her laches from surcharge or falsification of any part of it; secondly, for the reason that, their second settlement, having been made in June, 1888, more than six years before the commencement of this suit, a similar bar is raised. Our Code (c. 87, s. 22), speaking of the report of settlements of accounts of fiduciaries, says: "The report to the extent to which it may be so confirmed shall be taken to be correct, except so far as the same may in a suit in proper time be surcharged or falsified." Now, it appears, as we have seen, that the executors of the estate of James M. Campbell, deceased, settled their accounts as such before a commissioner on the 13th of December, 1883, which settlement was confirmed by the county court December 23, 1883, and this suit was not instituted until October, 1894. This first settlement was unexcepted to, and dealt with all the items that are now sought to be surcharged and falsified. A second settlement was made, as before stated, on June 16, 1888, which was retained by the commissioner for ten days for exceptions, but which remained unexcepted to. The balance found due from said executors on the first settlement was one thousand three hundred and forty dollars and eighteen cents. In the second settlement the executors are charged with this amount, and the interest collected at different times on three thousand dollars, invested for the benefit of the widow of said James M. Campbell, and the interest on nine hundred and ninety-nine dollars and thirty-nine cents used by E. A. Freshwater, one of the executors, for three years and four months; and they were credited with certain amounts disbursed by them, ascertaining a balance in favor of said executors of five dollars and seventy-four cents. Now, the only criticism made upon this second settlement of accounts appears to be that the same was not made in the time required by law, and for that reason said executors should not be allowed commissions; and because it does not charge the proper balance carried over from the former settlement, which balance should be corrected in the manner indicated in the objections raised to the first settlement; so that it appears that the entire effort to surcharge and falsify said accounts was directed

against the items charged in the first settlement, with the exception of the objection to the commissions charged in the second settlement on the ground that the settlements were not made in time. Was this suit instituted in time to raise these questions? It has become a maxim that equity favors the vigilant, and looks with discountenance upon stale demands, and it has been frequently held that long delay, and sometimes a delay less than the period of the statute of limitations, will be treated as laches sufficient to deny the aid of equity. As was said by Lord Camden in *Smith* v. *Clay*, 3 Brown, Ch. 640, note: "A court of equity, which is never active in relief against conscience or public convenience, has always refused its aid to stale demands where the party has slept upon his rights, and acquiesced for a great length of time. Nothing can call forth this court into activity, but conscience, good faith, and reasonable diligence. Where these are wanting, the court is passive, and does nothing. Laches and neglect are always discountenanced." So, in the case of *Pusey* v. *Gardner*, 21 W. Va. 470, this Court held (Syl., point 6) that: "Even where there is no absolute bar from lapse of time or by the statute of limitations, it is a principle of courts of equity not to take cognizance of an equitable claim after a great lapse of time; and where, from the death of parties, and witnesses, there is danger of doing injustice, and there can no longer be a safe determination of the controversy." And in point 7: "Lapse of time, when it does not operate as a positive statutory bar, operates, in equity, as an evidence of assent, acquiescence, or waiver." See, also, *Bland* v. *Stewart*, 35 W. Va. 518, (14 S. E. 215); and *Bill* v. *Schilling*, 39 W. Va. 108, (19 S. E. 514). In the case of *Cranmer* v. *McSwords*, 24 W. Va. 595, this Court held that: "In a suit in equity to enforce a purely equitable demand, the defense of the statute of limitations can have no application, of itself or by analogy, to any limitation in courts of law. Such cases must be determined by courts of equity upon rules and principles of their own. While in such cases laches and lapse of time are elements which cannot be safely disregarded, they are not always the most important considerations. Where the lapse of time is less than twenty years, the most important

considerations in support of this defense generally are: First, the death of the parties to the original transaction to be investigated, or the intervention of the rights of third persons; second, the loss of evidence when the transactions are complicated so as to render it difficult, if not impossible, to do justice," etc. In the case under consideration more than ten years had elapsed between the date of the confirmation of the first settlement and the institution of this suit, and more than six had elapsed since the last settlement was made before the suit was brought. One of the executors had died, and the suit had to be defended by his executors, who were necessarily unacquainted with many of the transactions. Under the provisions of the will, as understood by the executors, it appears they proceeded to administer the estate without reference to the three thousand dollars, directed to be loaned out and the interest applied to the support of the widow, the appellee herself receiving a considerable portion thereof, so far as appears, without objection, and, after acquiescing in the distribution thus made by the executors for so many years, she files her bill, praying another and different distribution, at variance with the settlements made by said executors, when they were both in life.

ON REHEARING.

After hearing the arguments, I am led to the conclusion that the plaintiff is entitled to a construction of the will, and especially the fifth clause thereof, in pursuance of her prayer asking therefor. The cardinal rule in construing a will is to seek from the entire instrument the intention of the testator. The law is stated thus in *Hinton* v. *Milburn's Exr's*, 23 W. Va. 166: "In the construction of a will the intention of the testator is to be ascertained by taking the whole will together. * * * The manifest intention must have effect, unless some rule of law is violated thereby." And in *Couch* v. *Eastham*, 29 W. Va. 784, (3 S. E. 23), this Court held that: "When the language of the testator is plain, and his meaning clear, the courts can do nothing but carry out the will of the testator, if it be not inconsistent with some rule of law." Now, when this will is examined, it is found that the testator, after providing

for the payment of his just debts and funeral expenses, and making certain provisions for his widow, in the third clause says, "To my children (naming them) I bequeath equal portions of my estate, share and share alike," after speaking of certain advancements he had made and intended to make. In the fourth clause he says, "I hereby authorize and direct my executors to make such disposal of the balance of my personal property not herein bequeathed as shall cause my heirs to share and share alike in the same," and in the fifth clause he directs that the sum of three thousand dollars, which was to be placed at interest for the benefit of his wife, should, at her death, be equally distributed among his heirs therein named. So, the testator in several places clearly manifests his intention of dividing his property equally among his children therein named, and the intention should be carried out, if possible. The said sum of three thousand dollars seems to have been loaned out by the testator to create an annuity for the benefit of his wife, and, the party to whom it was loaned becoming involved, some labor and expense was necessary in collecting the same; and, in fact, the sum was reduced to some extent by the cost of its recovery. The question which now presents itself for solution is: What must be regarded as the share of the plaintiff in the estate of James M. Campbell; and, if she has not already received it from the hands of the executors, can she require its payment out of said three thousand dollars, loaned for the benefit of said widow? Looking at the entire will for the intention of the testator, we must hold that at the death of the widow this three thousand dollars became a general fund in the hands of the executors, to be distributed as the other personal estate; and if, in the distribution made by the executors, which may be ascertained by reference to their accounts, settled as aforesaid, or by extraneous evidence, it is found that the appellee has not received what she was entitled to under the provisions of said will, she can recover from the executors whatever balance may be found due her out of the assets in their hands. The court, in its decree directing an account in this cause, held that the plaintiff was entitled to have the accounts of Freshwater and Campbell, executors of James M. Camp-

bell, deceased, and the accounts of Freshwater, surviving executor, restated and settled to conform to the construction of the will therein made, and referred the cause to a commissioner to settle said accounts, with leave to either party to surcharge and falsify the settlements as already made by said executors; and that said settlements should be regarded as prima facie correct, except so far as they might not conform to the construction of the will announced in said decree. This, as before stated, we regard as error, under the rulings of this Court in *Bland* v. *Stewart* 35 W. Va. 518, (14 S. E. 215), *Pusey* v. *Gardner*, 21 W. Va. 469, and *Trader* v. *Jarvis*, 23 W. Va. 100. Under these authorities the laches of the plaintiff would prevent her from surcharging the first two settlements made by the executors. Under this decree the commissioner proceeded to settle said account, but did not surcharge in any material manner the former settlements made by said executors, and the appellants are not prejudiced by the action of the commissioner in that regard, or by the decree allowing said accounts to be surcharged and falsified. In ascertaining the amount the respective parties were chargeable with by way of advancement, the commissioner charged interest on the amount received from the date of its reception, and, while the general rule is that interest is not charged upon advancements during the life-time of an intestate, as held in this Court, in *Kyle* v. *Conrad*, 25 W. Va. 760, and *Knight* v. *Yarborough*, 4 Rand. 569, yet where a testator, in his will, directs interest to be charged on advancements, it is proper to do so. See 1 Am. & Eng. Enc. Law, 785; also, *Treadwell* v. *Cordis*, 5 Gray, 341; *Nicholas* v. *Coffin*, 4 Allen, 27.

It is also claimed that the court erred in decreeing that the executors of G. W. Campbell recover against appellant such sum, not exceeding two thousand one hundred and forty dollars and seventy-eight cents, as they might pay of the amount recovered against them and appellant, there being no allegation in the bill, and no proof warranting such recovery, on the ground that there can be no decree between co-defendants unless the equities between the defendants arise out of the pleadings and proofs between the plaintiff and defendant. The proof in this

case, however, shows that this money was paid over to Freshwater by his co-executor, and was in his hands as part of the assets, and for that reason I regard the decree correct.

The only remaining error is in regard to the commissions which the commissioner refused to allow the executors, which action was confirmed by the court. The statute being so imperative that commissions shall not be allowed where personal representatives fail to make their settlements in proper time, we cannot disturb the decree in that respect, and for these reasons the same is affirmed.

Affirmed.

CHARLESTON.

ATKINSON v. WINTERS *et al.*

Submitted June 9, 1899—Decided December 2, 1899.

1. USE AND OCCUPATION—*Assumpsit—Pleading.*

Where an action of assumpsit is brought for the use and occupation of a tract of land, and the declaration contains only two counts, one of which is indebitatus assumpsit, and the other on the quantum meruit, and a bill of particulars is filed with the declaration, if the defendants interpose the plea of non assumpsit in five years, although a written agreement not under seal may appear in evidence, fixing the terms of the rental for one year, when the possession and occupancy continue for nearly six years thereafter, under our statute, the plaintiff shall not be nonsuited by reason of said writing appearing in evidence, but the same may be considered in fixing the value of the rental. (p. 231).

2. ASSUMPSIT—*Limitation—Plea.*

In an action of assumpsit for the use and occupation of land, where the cause of action arises upon the breach of the

contract, and not at the time of making the same, a plea that the defendant did not assume, as in the declaration set forth, within five years prior to the commencement of this suit, is not a proper plea. It should be that the action did not accrue within five years, etc. (p. 233).

3. DEFENSE—*Limitation—Affirmative—Plea.*

The defense of the statute of limitations is an affirmative one, and a plea of the statute which merely avers the pleader's conclusions of law is bad. The plea must, as a general rule, set up the facts constituting the bar,—as, for instance, that the alleged cause of action did not accrue within certain designated years previous to the institution of the suit. (p. 236).

Error to Circuit Court, Marshall County.

Action by Edward M. Atkinson against W. H. and J. F. Winters. Judgment for plaintiff, and defendants bring error.

Affirmed.

ROBERT WHITE, for plaintiffs in error.

CALDWELL & CALDWELL, for defendant in error.

ENGLISH, JUDGE:

On the 27th day of March, 1896, Edward M. Atkinson, instituted an action of trespass on the case, in *assumpsit*, against William H. Winters and James F. Winters, in the circuit court of Marshall County, to recover three thousand dollars for the use and occupation of a certain farm, with its appurtenances. The declaration contains two counts,—the first being the ordinary count for use and occupation; and the second, the usual *quantum meruit* count. The defendants filed three special pleas,—the first being that they did not assume and promise as in the declaration set forth within five years prior to the commencement of the suit; the second averring that, if they made the plaintiff the promise alleged in his declaration, at the time of making such promise the defendants were hopelessly drunk, and wholly incompetent to make any promise valid and binding in law; the third averring that they did not occupy and enjoy the premises mentioned by virtue of any contract, lease, or agreement with the plaintiff, but because they claimed title to said premises in themselves,

and denied all title of plaintiff to the same,—to all of which pleas the plaintiff replied generally, and issue was thereon joined. During the trial a paper purporting to be a lease from E. M. Atkinson to W. H. Winters and J. F. Winters, bearing date April 1, 1889, for a tract of land known as the "James Winters Farm," situated in Sand Hill district, Marshall County, West Virginia, containing about one hundred and eighty acres, for the term of one year, commencing the 1st of April, 1889, and ending March 31, 1890, in consideration of three hundred dollars, which was in the usual form, and signed by E. M. Atkinson, W. H. Winters, and James F. Winters, but not sealed, was offered in evidence, and objected to by defendants' counsel. The objection having been overruled, the lease was read in evidence to the jury, which lease, at its conclusion, contained the following stipulations: "It is mutually agreed that in case the Supreme Court of the State of West Virginia shall decide the case in which said party of the first part purchased said land in favor of said Winters or his children, or shall decide in said cause that Atkinson was not in possession of said farm at the time the supersedeas was allowed in said cause, then in either case this lease shall become void and of no effect; and it is further agreed that said second party waives no right of any kind in connection with said cause by making this lease." The plaintiff also asked the court to give the jury the following instruction: "No. 1. A tenant for years, who holds over after the expiration of his term without paying rent, or otherwise acknowledging a continuance of the tenancy, becomes either a trespasser or a tenant, at the option of the landlord. No. 2. Where the landlord suffers the tenant to remain in possession after the expiration of the original tenancy, the law presumes the holding to be upon the terms of the original tenancy. No. 3. The court instructs the jury that the paper marked 'No. 61,' at the time it was executed, was a lease with provisos; and at the time the cause of action accrued in the cause the court of appeals having decided the cause referred to in the paper marked 'No. 61,' as appears in evidence of said cause, the said paper became a valid lease, with the term thereof to date from April 1, 1889, the date of said lease. No. 4. A lease

for years is a contract for the possession and profits of land for a determinate period, with the recompense of rent. No. 5. A lessee entering into possession or retaining possession under a lease is estopped, while retaining possession, to deny his landlord's title. This arises from the nature of the contract of lease, which is for the possession and use for a prescribed period of the lessor's property under considerations to him by way of rent or otherwise." But the court refused to give No. 3 as presented by the plaintiff, but gave in lieu thereof the following, to wit: "The court instructs the jury that the paper marked 'No. 61,' at the time it was executed, was a lease with provisos. At the time the cause of action accrued in this cause the Court of Appeals having decided the cause referred to in this paper marked 'No. 61,' as appears by the record in evidence of said cause, the said paper became a valid lease, with the terms thereof to date from April 1, 1889, the date of said lease." And the defendants asked the court to give certain instructions to the jury, numbered one, two, three, four, five, six, to wit: "Instructions: No. 1. The court instructs the jury that if they believe from the evidence that the Supreme Court of Appeals of West Virginia did decide the case referred to in the contract of April 1, 1889, in evidence, in favor of the children of the defendant W. H. Winters, then they must find that the said contract is nugatory and is not binding upon the defendants. No. 2. If the jury believe from the evidence that the question of the possession of the plaintiff, Atkinson, named in said contract of April 1, 1889, has not been decided in the cause therein referred to, then the jury must find that said contract cannot now be enforced in the suit against said defendants. No. 3. The court instructs the jury that, if they believe from the evidence that it was the intention and understanding and agreement between the parties at the time of entering into the contract that said contract was not to have the full effect of a simple lease of real estate, then the jury cannot and should not give it the effect of a lease between the parties. No. 4. If the jury believe from the evidence that it was the intention and agreement and understanding of the parties to said agreement of April 1, 1889, that the question of the possession or right to the

possession of the real estate therein named was not to be thereby settled or fixed, but was reserved and remained open, then said contract cannot be treated by the jury as settling the rights of the parties as to the possession of said property. No. 5. The court instructs the jury that the plaintiff in this case is required to prove his case by a preponderance of the evidence. No. 6. The court further instructs the jury that unless they believe from the evidence that the plaintiff has proved by a preponderance of the evidence that it was the intention of the parties to the contract offered in evidence, and dated April 1, 1889, at the time of the execution, that it was to operate and have the force and effect of a lease between the parties thereto, then the jury are instructed that they shall not treat said contract as a lease, but shall treat and consider it according to the intention of the parties at the time of the execution of said contract, as shown by the evidence introduced." These instructions were refused by the court, but in lieu thereof the court gave an instruction marked "1," which does not appear in the record, and the clerk certifies that it cannot be found after diligent search. This instruction, however, by agreement filed, appears to have been subsequently found, and reads as follows: "The court instructs the jury that the plaintiff, in order to recover in this case against the defendants, is required to prove his case by a preponderance of all the evidence,"—which instruction was given in lieu of the instruction asked by defendants. The record in the chancery suits of I. N. Ewing against W. H. Winters et al. and James Rine against W. H. Winters, from the circuit court of Marshall county, were read in evidence to the jury; also, the opinion and mandate of this Court in the case of *Ewing* v. *Winters*, 11 S. E. 718. Numerous witnesses were examined, and the case submitted to a jury, who found for the plaintiff for the sum of two thousand one hundred and thirty-three dollars and ninety cents. The defendants moved in arrest of judgment, and asked the court to set aside the verdict of the jury and grant them a new trial, which motion was overruled by the court, the defendants excepted, and judgment was rendered upon the verdict, and thereupon the defendants obtained this writ of error.

Now, in considering the questions presented by the record in this case, it may be well to look first at the pleadings. The declaration contains but two counts. The first, as we have seen, is indebitatus assumpsit, and the second on the quantum meruit; no mention being made of a written lease. Besides the plea of the statute of limitations, non assumpsit in five years is pleaded and relied on; and to this plea there is no special reply, the plaintiff relying on the general replication. The suit therefore in no manner appears to have been predicated upon any lease in writing. Our statute (section 7, chapter 93, Code) provides that: "Rent of every kind may be recovered by distress or action. A landlord may also, by action, recover (where the agreement is not by deed) a reasonable satisfaction for the use and occupation of lands; on the trial of which action, if any parol demise, or any agreement (not being by deed) wherein a certain rent was reserved, shall appear in evidence, the plaintiff shall not therefore be non-suited; but may use the same as evidence of the amount of his debt or damages." Under this section of the statute, this action might have been brought upon said written contract. The plaintiff has, however, seen proper to take a different course, and the contract was offered in evidence. The statute says that when thus offered it may be used as evidence of the amount of the plaintiff's claim, and that it may be so used was held in the case of *Goshorn* v. *Stewart*, 15 W. Va. 657. Let us next inquire whether said written contract could be used for any other purpose than that designated in the statute. It is neither declared on nor relied on by way of reply to the statute of limitations, there being no intimation in the pleadings that the plaintiff's claim was based upon a written agreement. When it appears in evidence, it does not have the effect of nonsuiting the plaintiff, as it did before the statute, but may be used as evidence of the amount of debt or damages. When we look to the terms of this contract, it appears that it was for one year, commencing April 1, 1889, and ending March 31, 1890; and while, subsequent to the last-named date, there was no written agreement as to the rental to be paid, yet the law would presume that the tenant kept the property at the same rate, in the absence of any subse-

quent contract. This written agreement seems to have been limited expressly to one year. It also contained a stipulation that if this Court should decide the case in which E. M. Atkinson purchased said land in favor of said Winters or his children, or should decide that Atkinson was not in possession of said farm at the time the supersedeas was allowed, then in either case said lease should become void and of no effect, and that said parties of the second part waived no rights of any kind in connection with said cause by making said lease. The case referred to as pending in this Court was not decided during the continuance of said written lease, but the opinion in the case was handed down on June 21, 1890, nearly three months after the termination of said lease, reversing the court below, and holding that a proper construction of the will of James Winters was that he gave to W. H. Winters the homestead for life, an estate to his wife, should she survive him, during widowhood, and the remainder over in fee to his children, to vest in possession at the marriage or death of his widow, should his wife survive him, otherwise at his own death; but allowing Atkinson to hold the property under his purchase at the judicial sale which had been confirmed under section 8 of chapter 132 of the Code. This Court did then decide said cause in favor of Winters and his children, but did not decide that Atkinson was not in possession of said farm at the time the *supersedeas* was allowed; but neither of said contingencies occurred during the continuance of said lease, and for that reason it was not affected thereby. The defendants and appellants remained in possession of the land after the termination of the lease, until the institution of this suit, which, as we have seen, was not brought upon said written contract, but was brought for the use and occupation of the land; and the writing was, we think, properly admitted in evidence in order to fix the amount of rent. Taylor, in his valuable work on Landlord and Tenant (volume 2, § 635), in speaking of the action for use and occupation, says: "At common law an action of assumpsit for use and occupation could not be maintained if there was an express demise. Debt for use and occupation would always lie, but the plaintiff in assumpsit was liable to nonsuit if an express demise was proved. This

restriction was removed by St. 11 Geo. II. chap. 19, where the demise was not by deed, and recovery in an action of case (that is, assumpsit) was allowed, notwithstanding an express demise not under seal was proved. In this action the landlord recovers, not rent, but the equivalent of rent (that is to say, a reasonable satisfaction for the use and occupation of the premises which have been held and enjoyed under the demise); and the rent fixed by the agreement is only used as a medium by which the damages in this form of action shall be ascertained and liquidated."

As we have seen, the English statute above quoted has, in substance, been adopted in our statute, which expressly allows the written agreement as evidence as to the amount of the debt or damages, and to be used in fixing the amount of the rent per annum. Then, as to the statute of limitations: When we refer to section 6 of chapter 104 of the Code, we find that the ten-years limitation applies to "every action to recover money which is founded * * * upon a contract by writing signed by the party to be charged thereby or his agent, but not under seal, and if it be upon other contract within five years unless," etc. Now, as this suit was not founded upon said written contract, I hold that the limitation of five years is not affected by said written contract, but applies to the entire account sued on, and set forth in the bill of particulars filed with the plaintiff's declaration, without reference to said written contract. Commencing with the one hundred and fifty dollars due September 30, 1891, and including interest to the date of the verdict, the rent for the five years next preceding the institution of this suit would be one thousand seven hundred and forty-eight dollars and forty-three cents, which is three hundred and eighty-five dollars and forty-seven cents less than the verdict found by the jury. So that in my view of the case the verdict was excessive, and should have been set aside.

As to the instructions asked for by the plaintiff, Nos. one, two, four and five were abstract propositions of law, with reference to the lease offered in evidence. Instruction No. 3, as asked for by the plaintiff, and as modified and given by the court, in either form was improper, because, as was held by this Court in *Barber* v. *Insurance*

Co, 16 W. Va. 658, "it is error to instruct a jury as to a clause of a contract not presented to the court by the pleadings." Nos. four and five were well calculated to mislead the jury. While it is true, as an abstract proposition, as stated in No. five, that "a lessee entering into possession under a lease is estopped, while retaining possession, to deny his landlord's title, which arises from the nature of the contract of lease, which is for the possession and use for a prescribed period of the lessors' property under considerations to him by way of rent or otherwise," yet this law applies to an ordinary lease without such a stipulation as is contained in this lease, referring to the pendency of said appeal in this court, and providing that no right of any kind in connection with said cause should be waived by making said lease; clearly indicating that it was not the intention of the parties that by said lease W. H. Winters or James Winters should thereby concede that E. M. Atkinson was their landlord, or entitled to the possession of the land. Again, said written agreement was expressly limited in duration to one year, and even if the action had been predicated upon it, instead of being an action of assumpsit, for use and occupation, said instruction No. 5, as given by the court, was calculated to mislead the jury, and should not have been given to them, for the further reason that it tells the jury that said paper became a valid lease, with the terms thereof to date from April 1, 1889, the date of the lease, when said paper was not sued upon, or its validity questioned, and was only admissible upon the question of the yearly value of the property. Instruction No. 4 should have been rejected for the same reason. It told the jury that "a lease for years was a contract for the possession and profit of land for a determinate period, with the recompense of rent," when there was no action upon such a lease before the jury, and the lease was only introduced before them to fix the rental value of the land per annum. Instructions Nos. 1 and 2 should have been rejected for the reason that No. 2 speaks of the landlord suffering the tenant to remain in possession, etc., when the closing stipulation in said agreement was inserted to prevent Atkinson from being thereby recognized as landlord; his rights to the rents being in litigation and not de-

termined until nearly three months after the termination of said lease. No 1. contains an abstract proposition of law, and was calculated to mislead the jury, because the proviso in the lease was to prevent the recognition of the plaintiff as landlord. The court held in *Pasley* v. *English*, 10 Gratt. 236: "The court is not bound to give such an instruction, and, if it does so under circumstances calculated to mislead the jury, such instruction will be error for which the judgment will be reversed." The defendants asked the court for six instructions, all of which were rejected by the court. In No. 5 the court was asked to instruct the jury that the plaintiff was required to prove his case by a preponderance of the evidence. On what ground this instruction was rejected, it is difficult to determine. The court, however, it seems did give an instruction in lieu thereof, which was lost out of the papers when the record was printed, but was subsequently found, and is quoted above, and is almost in the same language as No. 5 asked for by defendant and rejected by the court. It has been held that a party has the right to have his instructions given in his own language, provided the facts sustain it, and it states the law correctly. *Evans' Case*, 33 W. Va. 417, (10 S. E. 792). In an action for assumpsit for use and occupation, with a bill of particulars covering the whole time that the defendants were claimed to have occupied the premises, the plaintiff surely could have been required to prove his case by a preponderance of testimony, and it was error to reject said instruction as prayed for. In my view of the case, the other instructions asked by the defendant were not material, and defendants were not prejudiced by their rejection. This action was on an account for rent running over six years. The statute of limitations was pleaded and relied on, and, in my opinion, all of the account which accrued more than five years next before the institution of the suit was barred by the statute of limitations.

ON REHEARING.

After a careful examination of the briefs filed, and close attention to the oral arguments presented on rehearing, I have no change to make in the opinion handed down in

this case, except as to the question sought to be raised by the plea of the statute of limitations. Was the plea interposed by the defendants sufficient in form to bar any portion of the claims sued upon? Under our statute, where the claim or claims sued upon are not sufficiently described in the declaration, section 11, chapter 125, provides that in every action of assumpsit the plaintiff shall file with his declaration an account stating distinctly the several items of his claims, unless it be plainly described in the declaration; and, if he fail to do so, he shall not be permitted to prove any item not stated in such account on the trial of the case. In this manner the account filed becomes a part of the declaration, and in this particular action it is apparent that each succeeding year created a distinct and separate cause of action. Speaking of the frame of the plea of the statute of limitations, Minor, in his Institutes (volume 4, point 1, page 800), says: "Neither is it expedient, nor always admissible, to aver that * * * the defendant did not assume in manner and form as by the plaintiff is alleged within——years next before the commencement of this action; for the cause of action may not have been contemporaneous with the promise, but may have accrued afterwards, as when the promise was to pay money at a future day. The proper mode of averment (which is always proper) is that the cause of action did not accrue within——— years next before the commencement of this action." As to the form prescribed, he says (same page): "If there be several causes, say the said several supposed causes of action in the declaration mentioned did not, nor did any or either of them, 'accrue,' etc." So, also, in 13 Enc. Pl. & Prac. 214, under the head head "Requisites of Plea," we find it said: "Since the defense of the statute of limitations is an affirmative one, a plea of the statute which merely avers the pleaders' conclusions of law is bad. The plea must, as a general rule set up the facts constituting the bar, as, for instance, that the alleged cause of action did not accrue within certain designated years previous to the filing of the complaint." Our statute (section 6, chapter 104, Code, provides that "every action to recover money which is founded upon * * * any contract shall be brought in the following num-

ber of years next after the right to bring the same shall have first accrued." Hogg, Plead. & Forms, 248. prescribes the same form for plea that is found in Minor. By the terms of the lease which was offered in evidence in this cause, the lessees bound themselves to pay three hundred dollars,—one hundred and fifty dollars on October 1, 1889, and one hundred and fifty dollars March, 1890 and the dates of the subsequent payments are set forth in the bill of particulars. In *Soulden* v. *Van Rensselaer*, 3 Wend. 472, the court said: "In this case the declaration is on a promise to perform a future act. No cause of action could, therefore, exist contemporaneously with the promise The plea of *non assumpsit infra sex annos* was improper. It should have been a plea of action *non accrevit infra*, etc." So, on page 213, 13 Enc. Pl. Prac. it is said: "The plea that the cause of action did not accrue within the statutory time * * * is the only method of pleading the limitation where the cause of action does not immediately arise from the making of a promise, but results from a breach happening after the promise is made." In the case at bar the cause of action did not arise until the failure to pay the rent as it became due, long subsequent to the contract contained in the lease. On the face of the lease it also appears that at its date the defendants had obtained an appeal and supersedeas to this court of the chancery cause in which said tract of land had been sold to the plaintiff, Atkinson, which appeal remained undecided until June 21, 1890; and it was expressly agreed on the face of said lease that its validity should depend on the character of the decision of said cause then pending in this court. Under section 18 of chapter 104 of the Code, the period during the pendency of said appeal should not be computed in applying the statute of limitations. For these reasons, my conclusion is that the judgment complained of should be affirmed.

Affirmed.

CHARLESTON.

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BOYD *et al.* *v.* BROWN.

Submitted June 17, 1899 Decided December 2, 1899.

1. PROMISE—*Mutuality—Performance Binding.*
   A promise lacking mutuality at its inception becomes binding upon the promisor after the performance by the promisee. (p. 249).

2. MUTUALITY—*Defense—Specific Performance.*
   Lack of mutuality is no defense, even in a suit, for specific performance, where the party not bound thereby has performed all of the conditions of the contract, and brought himself clearly within the terms thereof. (p. 249).

Appeal from Circuit Court, Tyler County.

Bill by W. F. Boyd and Archie P. Boyd and others against W. J. Brown. Decree for plaintiffs, and defendant appeals.

F. D. YOUNG and BASIL P. BOWERS, for appellant.

F. L. BLACKMARR, for appellees.

MCWHORTER, JUDGE:

At the November rules, 1897, W. F. Boyd and A. P. Boyd, partners as Boyd Bros., and A. J. Malarky and G. B. McMillen, partners as Malarky & McMillen, filed their bill in chancery in the circuit court of Tyler County against W. J. Brown, alleging that in the month of June, 1897, said plaintiffs, W. J. Brown, U. F. Randolph, H. W. Roberts, M. R. Seal, C. C. Marsh, J. L. Thompson and O. Hickok, were the owners of an undeveloped lease for oil and gas purposes, situate in Ellsworth district, Tyler County, dated August 8, 1897, made by D. W. Snider and Sarah J., his wife, to J. L. Thompson and H. W. Roberts, on a tract of thirty and forty-seven one-hundredths acres of land, and held the same in the following proportions: Boyd Bros. one-fourth, Malarky & McMillen, one-twelfth, W. J. Brown,

one-eighth, U. S. Randolph, one-twenty-fourth, H. W. Roberts, one-eighth, M. R. Seal, one-sixteenth, C. C. Marsh, one-sixteenth, J. L. Thompson, five-twenty-fourths, and O. Hickok, one-twenty-fourth; and the said owners being desirous of having a test well drilled on the lease, which at that time was undeveloped, and considered what is known as "wild cat" territory, they met on the——day of June, 1897, for the purpose of making some arrangement to have a test well on the lease, and said Brown, Randolph, Roberts, Seal, Marsh, and Thompson "made the following propositions to the said Boyd Bros. and Malarky & McMillen: That if they, the said Boyd Bros., and Malarky & McMillen, would drill a test well for oil and gas upon said D. W. Snider lease, and carry the interest of each of them free of any and all expense to them and at once commence operations for the drilling of said well for oil and gas on said leased premises, and prosecute the same diligently to completion to the bottom of the Big Injun sand, unless oil and gas should be found in paying quantities at a less depth, and, if the said well should be a flowing, producing well, to make the necessary connections, and provide the same with not less than two two hundred and fifty-barrel tanks, and, should said well be a paying, pumping, producing well, to tube the same, and provide it with the necessary sucker rods, tankage, and complete pumping outfit, said well to be drilled and provided with the necessary machinery, material, and equipments by the said Boyd Bros., and Malarky & McMillen without cost or expense of any kind whatsoever to them, and, if said well should not be a producing well, that the said Boyd Bros. and Malarky & McMillen should have the right to keep, take, and remove all the machinery and material placed by them upon said lease, but, if said well should be a paying, producing well, that then they should each have, hold, and enjoy the same proportionate interest in said well and in the wood rig, boiler, engine, casing, tubing, sucker rods, pumping outfit, and all machinery, material, and equipments neccessary for the operation of said well that they would hold and own in the leasehold upon which said well should be situated after they one and all had complied with the terms of this agreement, without cost or expense to

them of any kind. That they, the said W. J. Brown, U. F. Randolph, H. W. Roberts, M. R. Seal, C. C. Marsh, and J. L. Thompson would each give, assign, and convey unto the said Boyd Bros. and Malarky & McMillen the undivided one-half of the interest then held and owned by each of them in the said D. W. Snider lease, and the said Boyd Bros. and Malarky & McMillen then and there accepted said proposition, and agreed to drill said well upon the terms proposed by the said W. J. Brown, U. F. Randolph, H. W. Roberts, M. R. Seal, C. C. Marsh, and J. L. Thompson, and the said Boyd Bros. and Malarky & McMillen agreed that they would begin the putting down of said well upon the next day; and it was further agreed that, upon the completion of said well in accordance with the terms of the agreement proposed by the said W. J. Brown and others, and accepted by the asid Boyd Bros. and Malarky & McMillen, being the same as heretofore stated, that the said W. J. Brown, U. F. Randolph, H. W. Roberts, M. R. Seal, C. C. Marsh, and J. L. Thompson would give and convey unto the said Boyd Bros. and Malarky & McMillen the following undivided interest in said Snider heirs' lease, to wit, the said W. J. Brown would convey to them an undivided five-forty-eighths interest, the said U. F. Randolph would convey to them an undivided one-forty-eighth interest, the said H. W. Roberts would convey to them an undivided three-forty-eighths interest, the said M. R. Seal would convey to them an undivided one-thirty-second interest, the said C. C. Marsh would convey to them an undivided one-thirty-second interest, and the said J. L. Thompson would convey to them an undivided three-forty-eighths interest. That, having accepted the terms proposed by the said W. J. Brown, U. F. Randolph, H. W. Roberts, M. R. Seal, C. C. Marsh, and J. L. Thompson for the drilling of said well upon said Snider heirs' lease, the said Boyd Bros. and Malarky & McMillen began operations upon the following day after said agreement was made for the drilling of said well, put up the necessary wood rig, purchased the necessary machinery, casing, and all material necessary for said well aud drilled and completed said well in accordance with each, every, and all of the terms of the agreement aforesaid, and said well

proved to be a very large paying well; and thereupon said Boyd Bros. and Malarky & McMillen, having fully executed and completed and complied with the terms of the agreement heretofore stated for the drilling of said well, they called upon the said W. J. Brown. U. F. Randolph, H. W. Roberts, M. R. Seal, C. C. Marsh, and J. L. Thompson to give, assign, and convey to them the respective interest in the said D. W. Snider lease, a copy of which said lease is hereto attached, and made a part of this bill as 'Exhibit A'; and the said U. F. Randolph H. W. Roberts, M. R. Seal, C. C. Marsh, and J. L. Thompson readily complied with the terms of the agreement aforesaid on their part, and executed an assignment to the said Boyd Bros. and Malarky & McMillen for the undivided interests in said lease which they had agreed to give to Boyd Bros. and Malarky & McMillen as a consideration for the drilling of said well without any cost or expense to them. That the said W. J. Brown refused, and still refuses, to convey unto the said Boyd Bros. and Malarky & McMillen the undivided three-forty-eighths interest in said D. W. Snider lease hereto attached as 'Exhibit A,' which he agreed to give and convey to them in consideration of their drilling said well upon the terms and conditions as aforesaid, and of its proving to be a paying, producing well. And the said plaintiffs further complain and say that, having fully complied with and executed the terms of the agreement in regard to the drilling of said well upon their part, and having expended in so doing a large sum of money, to wit, the sum of more than——thousand dollars, the said W. J. Brown in law and equity is bound to convey to them the said undivided three-forty-eighths interest in said D. W. Snider lease, as he agreed that he would do. And the plaintiffs further complain and say that there were present at the time of the making of said agreement by the said W. J. Brown the following named persons, to wit, W. J. Brown, the defendant in this suit, U. F. Randolph, M. R. Seal, C. C. Marsh, J. L. Thompson, W. F. Boyd, A. P. Boyd, A. J. Malarky, and the said H. W. Roberts was represented by the said U. F. Randolph. And the said plaintiffs further complain and say that by and through the refusal of the said W. J. Brown to give and

convey to them the undivided three-forty-eighths interest in said D.W. Snider lease in consideration for the execution of the agreement by them for drilling said well as set forth in this bill of complaint they will suffer irreparable loss, and great pecuniary damage, the amount of which it is impossible to calculate." They further allege that said Brown was offering to sell and dispose of said three-forty-eighths interest which he agreed to convey to them in consideration of their drilling said well and carrying his interest therein without any costs or expense to him, and was trying to get possession of the proceeds of the oil sold from said lease that would belong to said three-forty-eighths interest, which was in the custody of W. L. Armstrong, who was appointed receiver of said Snider lease in the chancery cause of T. M. Darrah and others against W. F. Boyd, W. J. Brown, and others in the circuit court of Tyler County, and Brown refused to give or turn over to plaintiffs that share of the money produced from the said oil that would belong to the said three-forty-eighths interest in the Snider lease that said Brown agreed to give to plaintiffs in consideration of drilling said test well, and prayed that defendant Brown be enjoined and inhibited from selling or disposing of or conveying to any one but plaintiffs the said undivided three-forty-eighths interest in said lease, and from taking or receiving, or in any way disposing of, the money in the hands of said receiver, Armstrong, on account of said three-forty-eighths interest, and that defendant Brown be required to convey to plaintiffs said interest in said lease, in accordance with his said agreement, together with a division order in the pipe line running the oil from the said Snider lease for an undivided three-forty-eighths part belonging to the working interest of said lease, and that said receiver, upon the settlement of his account, be decreed to pay to plaintiffs that share of the money that belongs to and may be payable to the said undivided three-forty-eighths interest in said lease in the possession of said Armstrong, and for general relief. Plaintiffs exhibit with their bill the said lease. Defendant Brown filed his demurrer and answer to said bill, admitting the ownership of the lease as alleged, and that it was wholly unde-

veloped; but denies the material allegations of the bill; alleges that he not only did not assent to the contract with plaintiffs for drilling the well, as alleged, but objected to it, stating that he had been offered better terms, and that at the time the parties were together as alleged respondent said he would not agree to it at that time, but would consider the matter, and decide what to do, and so advised his joint tenants; and that, although he arrived at the conclusion not to agree to said proposition, he never had any further conversation relating to the matter until after the commencement of the test well, or, possibly, the completion of it with his tenants in common. Respondent avers that Boyd Bros. went into possession of said leasehold without asking his consent, and without such consent, and without any agreement made with him, which, as joint tenants, they had a right to do, and which respondent could not prevent if he had so desired, and did drill a test well thereon, and brought in a good producing well. Respondent avers that any verbal contract entered into by any of said joint owners of said leasehold with Boyd Bros. or any other person on said——day of June, 1897, or at any other time, was and is absolutely null and void, and of no force or effect, and not enforceable at law, for the reason that it was an attempt to convey real estate, or such interest therein as required a deed to pass title, and is strictly within the prohibition of the statute of frauds; and submits to the court as a matter of law that plaintiffs should not have or maintain this suit on the bill filed in the cause averring that the entire expense incidental to drilling, operating, etc., said lease up to March 10, 1898, amounts to twenty-nine thousand six hundred and two dollars and forty-seven cents, and the entire receipts therefrom are fifty thousand five hundred and ninety-four dollars and seventy-five cents to same time, and respondent is entitled to one-eighth part of the moneys, subject to his eighth part of the drilling and expenses, and also to moneys paid him by Armstrong, the receiver; and prays that plaintiffs be decreed to have no claim of title on the said one-eighth undivided interest of respondent, and that their bill be dismissed. Depositions were taken and filed on behalf of both plaintiffs and defendant, and the cause was

submitted on the——day of August, 1898, when the court overruled the defendant's demurrer to the bill, and by its decree enjoined defendant from selling, disposing of, or conveying to any one except plaintiffs the undivided one-sixteenth interest in the lease, and from taking or receiving or in any way disposing of the money in the hands of Receiver Armstrong, otherwise than as ordered by said decree, belonging to said one-sixteenth interest in said lease, and directed defendant to convey to plaintiffs the undivided one-sixteenth interest in said lease, and to execute a division order in the Eureka Pipe Line Company, running the oil from said Snider lease, for an undivided one-sixteenth part of said oil belonging to the working interest of said lease to plaintiffs, and that Receiver Armstrong be ordered and decreed to pay to plaintiffs that share of the money that belongs to and may be payable to the said undivided one-sixteenth interest in said lease that is in possession of said Armstrong, and that said defendant Brown execute said assignment for said one-sixteenth interest and the said division order within ten days from the entering of the decree, and that said defendant Brown pay to plaintiffs the cost of their suit.

From this decree defendant appealed to this court, and says that the court erred in overruling his demurrer to the bill; that the demurrer should have been sustained because the bill contains no equity and discloses no ground of equitable jurisdiction; that the contract, if any, was a verbal contract for the sale of real estate, or an interest therein, and was absolutely void; and cites authorities to show that real estate can only be conveyed by deed, and that the contract sued upon here is such as is inhibited by the sixth clause of chapter 98, Code. Courts of equity do not hesitate to enforce even verbal contracts for the sale of real estate where there has been part performance in good faith. In *Lowry* v. *Buffington*, 6 W. Va. 249,—a suit brought to enforce a parol contract,—it is held that: "When there has been part performance of a contract for the sale of land by the purchaser being put in possession of the property and payment of the purchase money, or part thereof, and an offer to pay the residue according to contract, and valuable improvements have been made on

the land by the purchaser on faith of the contract, the statute of frauds cannot be successfully pleaded in bar to the performance in a court of equity." In *Campbell* v. *Fetterman's Heirs*, 20 W. Va. 398, JUDGE SNYDER, in the opinion of the court, prepared by him, says: "The principles of law upon which parol contracts for the purchase of lands will be specifically decreed in courts of equity have been fully settled by a number of decisions of this court, and from these the following doctrines, among others, may be deduced: (1) The jurisdiction to enforce such contracts is entirely settled and unquestioned. (2) That the exercise of such jurisdiction is an application to the sound discretion of the courts, and is not a right to be granted ex debito justitiae; but, when the contract is unobjectionable, it is as much a matter of course for courts of equity to decree the specific execution of it as it is for courts of law to give damages for a breach of it. * * * (4) That in such cases it must appear: First, that the parol agreement relied on is certain and definite in its terms; second, the acts proved in part performance must refer to, result from, or be made in pursuance of the agreement proved; and third, the agreement must have been so far executed that a refusal of full execution would operate a fraud upon the purchaser, and place him in a situation which does not lie in compensation at law,"—and cites *Land Co.* v. *Vinal*, 14 W. Va. 637; *Baldenberg* v. *Warden*, *Id.* 397; *Middleton* v. *Selby*, 19 W. Va. 167; *Lowry* v. *Buffington*, 6 W. Va. 249. The contract relied on in case at bar was surely certain and definite in terms. Boyd Bros. and Malarky & McMillen were to furnish everything, and be at all expense in preparing to produce and save the oil, in consideration of which the other parties were to assign to them one-half of their respective holdings in said lease. These people, the owners of the lease, were in some sort of trouble about the lease,—others, called the "Johnston people," claiming the right to it,—and had placed some material on the premises, and several of the owners of the Snider lease had gone, perhaps on the same day the meeting was held and the contract made, and had removed from the premises the material or stuff the Johnston people had placed there; and they were anxious to get

to drilling as soon as possible, that they might retain their possession; and defendant Brown himself, in speaking of the meeting when the contract was made, says:, "I don't think any one was there but what thought it best to act as prompt as possible." While defendant Brown testifies consistently with the allegations of his answer, and denies that he entered into the contract, on the other hand, all the others who were present making the contract say that he agreed with the rest of them to put his interest in on the same terms.

Appellant's second and third assignments are of the same character,—that the court erred in entering any decree against appellant, none being warranted by the evidence; and that it erred in decreeing in favor of plaintiffs upon their evidence taken and filed because the matters alleged and the proof do not agree. It is claimed that the bill alleges a contract with Boyd Bros. and Malarky & McMillen, while the proof—at least a part of it—speaks of a contract with Boyd Bros., and then it is claimed that the whole work was not done under the verbal contract, but that there was a written contract, signed by a part of the owners; and hence the fourth error assigned, —that the court erred in not reciting in its final decree what, in its opinion, the contract really was between complainant and defendant. About the time, or a little while before, the well was completed, the contract was reduced to writing, assigning the one-half of the several interests in the lease to Boyd Bros. and Malarky & McMillen in pursuance of the verbal contract, and was signed by all except defendant Brown and Hickok. The paper was presented to Brown to assign his one-half interest soon after the well came in, when he refused. The contract is about as clearly proved as a contract could well be. The witnesses testifying in regard to the contract, it is true, sometimes mentioned the contract as let to Boyd Bros., and yet I believe every one of them somewhere in this testimony mentioned Boyd Bros. and Malarky & McMillen as the contractors, and it was clearly understood by all that it was a matter between Boyd Bros. and Malarky & McMillen, and that Malarky was to do the drilling as far as the work and superintendence was concerned, Boyd Bros. and Malarky & Mc-

Millen to furnish everything, and complete the well, and do all that was necessary to produce and save the oil, whether the well should be a "flowing well" or "a pumper." Boyd Bros. and Malarky & McMillen went to work in good faith the next day after the contract, and completed the work. As stated by defendant in his testimony. "The work was commenced as soon as possible;" and he says, as far as he could learn, it was pushed to completion as rapidly as possible. There was no uncertainty in the contract as to what Boyd Bros. and Malarky & McMillen were to furnish and to do, nor as to what the consideration was to be for such furnishing and doing. They went to the work with the distinct understanding that all the owners present when the contract was made were parties to the contract, consenting thereto, and were permitted to go on and complete the whole work, with no notice that a single one of them did not so understand it, or did not acquiesce in it. Mr. Brown gave them no notice that he did not intend to stand by the contract. He says he is ready to pay his one-eighth of the cost and expenses. He is not in a position to say what he would do if the contractors had "struck a dry hole,"—whether he would be ready to put up his one-eighth of the expenses or not. Although the testimony of the defendant is very positive, the testimony in the whole case is overwhelmingly against him, and the judgment of the circuit court on that conflicting evidence is for the plaintiffs; and it has been held by this Court in *Smith* v. *Yoke*, 27 W. Va. 639; *Bartlett* v. *Cleavenger*, 35 W. Va. 720, (14 S. E. 273); *Richardson* v. *Ralphsnyder*, 40 W. Va. 15, (20 S. E. 854), and numerous cases since, a decree so rendered on contradictory evidence, even when it is doubtful which way the preponderance is, will not be disturbed.

The fifth assignment is that the court erred in decreeing defendant should execute and deliver to plaintiffs a division order for the one-sixteenth of the oil produced and belonging to the working interest in said lease, without also providing that the proportionate share of the expense of producing same be ascertained and deducted from said interest. As the matter now stands, appellant has paid all costs and expenses proportionate to his one-eighth interest; and under this decree—if it is a decree for specific execution—

he ought only to be held liable for the one-sixteenth interest that he is allowed to hold, and Boyd Bros. and Malarky & McMillen be held liable for the expenses of producing the one-sixteenth interest that they recover, because, if there was any contract, it dates back before there was any production. There is nothing in the pleadings or record showing that all expenses and cost of production were not paid by the receiver, W. L. Armstrong. On the other hand, Mr. Armstrong, who is examined as a witness for defendant, in answer to the question, "Can you state, in the aggregate, the total amount of drilling and operating expenses of that leasehold up to the present time?" said: "The total receipts to March 10th last were fifty thousand five hundred and ninety-four dollars and seventy-five cents. Total expenses—that is outside of dividends—is twenty-nine thousand six hundred and two dollars and forty-seven cents; leaving the difference between the two sums as dividends." And A. J. Malarky, in his testimony, states that when they were enjoined they went into court, "and there was a compromise made that we was to go on and complete the well. If a producing well, there was to be a receiver appointed; that receiver to sell all the oil, and pay the bills; which was agreed upon at the court house that day." He further says W. L. Armstrong was appointed receiver. He took charge of the oil, paid the bills, and work progressed right along just the same as it did before. This would indicate at least that the expense of producing the oil was paid by the receiver before disbursing to the beneficiaries, and the presumption is that the decree is right in that regard.

The sixth and seventh assignments have been disposed of with some of the foregoing assignments. The eighth is that the court erred in decreeing in favor of plaintiffs, because the contract was not mutual in its obligations and its remedy, and could not, under any circumstances, have been specifically enforced by the defendant against the plaintiffs, as both the plaintiffs and defendant had an adequate remedy at law. "Want of mutuality in the inception of the contract may be remedied by the subsequent conduct of the parties, or by the execution of the agreement." 7 Am. & Eng. Enc. Law (2d Ed.) 115. In *Willetts* v. *Insur-*

ance Co., 45 N. Y. 45, it is held: "A promise lacking mutuality at its inception becomes binding upon the promisor after performance by the promisee." *Train* v. *Gold*, 5 Pick. 380; *L'Amoreux* v. *Gould*, 7 N. Y. 349. "Want of mutuality is no defense, even in an action for specific performance, where the party not bound thereby has performed all of the conditions of the contract, and brought himself clearly within the terms thereof." 2 Beach, Cont. § 889, and cases cited. "The obligation must be mutual. In general terms it may be said that, unless the contract binds all the parties, it will be enforced against none of them." One modification of this rule is that the rule governs such contracts only as are executory, for, when the party who is not bound has performed his part under the contract, even though not legally bound to such performance, the plea of want of mutuality cannot be made. 22 Am. & Eng. Enc. Law, 1020, 1021; *Grove* v. *Hodges*, 55 Pa. St. 504; *Schroeder* v. *Gemeinder*, 10 Nev. 355; *Hawralty* v. *Warren*, 18 N. J. Eq. 124; *Coles* v. *Trecothick*, 9 Ves. 246; 5 Wait. Act. & Def. 788. Appellant contends that this cause, as to questions of law pertaining to it, is controlled and governed by the case of *Gallagher* v. *Gallagher*, 31 W. Va. 9, (5 S. E. 297); that plaintiffs never had notorious and exclusive possession of the leasehold, and such possession as they had was never delivered to them or taken by them under any contract with appellant, nor was it retained or continued under any such contract. The facts are that on the day following the making of the contract, at night, plaintiffs went into actual possession of the premises, and proceeded to carry out their part of the contract, and did so carry it out to completion. Several of the witnesses say "they carried it out to a letter." As to whether such contract existed between them and appellant was a question of fact to be established by evidence taken in the cause, and the great preponderance, as we have seen, establishes the contract. There seems to be no error in the decree, and the same is affirmed.

Affirmed.

CHARLESTON.

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LINN *v.* COLLINS *et al.*

Submitted Sept. 13, 1899—Decided Dec. 2, 1899.

1. INSOLVENT — *Assignment — Vendor's Lien—Purchaser — Caveat Emptor.*

Where a party who is insolvent makes a general assignment of his property, for the benefit of all of his creditors, to a trustee, and in said deed of assignment two parcels of real estate are conveyed, upon each of which the assignor owes a balance of purchase money, secured by vendor's lien, which tracts are advertised and sold by the trustee, without mentioning the liens in the notice of sale, to a party who is a large creditor of the assignor, for an adequate price, without reference to the liens, caveat emptor does not apply, and such purchaser, in the circumstances, has the right to discharge such liens out of the purchase money. (p. 253.)

2. CREDITORS—*Application of Proceeds.*

The other creditors of said assignor in such case would not be allowed to participate in the distribution of the proceeds of the sale until the amount of said liens is deducted therefrom and applied to the extinguishment of said liens. (pp. 253-254.)

Appeal from Circuit Court, Gilmer County.

Bill by R. G. Linn, trustee, against Spencer Collins and others. Decree for plaintiff, and defendant appeals.

Reversed.

J. M. HAMILTON, for appellants.

LINN, WITHERS & BRANNON, for appellee.

ENGLISH, JUDGE:

On the 22d day of February, 1893, Robert F. Kidd and wife executed to R. G. Linn, trustee, a deed of assignment, whereby Kidd conveyed to said trustee all of his property, to be applied pro rata to the payment of his debts, providing therein that it should be the duty of said trustee, as soon as practicable, to sell the real and personal property therein conveyed, on a credit, and upon the terms therein

set forth, and out of the net proceeds to pay the several creditors who should prove their debts as therein required, pro rata. A part of said real estate so conveyed was four and one-half eights, undivided, in a lot of two hundred and forty-five acres of the Joshua Reed farm, on Sycamore; one undivided half in the dower lot of one hundred and fifteen acres conveyed to said Kidd and Louis S. Reed and the heirs of Joshua Reed; and sixteen-seventeenths of lot No. 21 on Main street, in the town of Glenville, West Virginia, being the same property on which said Kidd resided at the date of said assignment. In pursuance of said deed of assignment, said trustee advertised all of said property for sale on the 5th of June, 1893, at which sale Spencer Collins became the purchaser; bidding for said Kidd's interest in the Reed farm two thousand two hundred dollars, and for the Glenville lot one thousand dollars; complying with the terms of sale by executing his notes, with A. S. McQuain and S. A. Hays as his sureties. Nothing having been paid on said notes, Linn, trustee, filed his bill in the circuit court of Gilmer County, against said Collins, seeking to subject said real estate to sale to satisfy the same. A portion of the original purchase money for said lot and the interest in said Reed farm remained unpaid at the time said deed of assignment was executed to Linn, trustee, and vendor's liens had been retained to secure this unpaid purchase money. The defendant Collins, in his answer to plaintiff's bill, claims that previous to said sale there was an understanding with the trustee and Hays, one of the principal creditors, whereby he was to bid one thousand dollars for the house and lot in Glenville, and two thousand two hundred dollars for said Kidd's undivided interest in the Reed farm, and was to become the purchaser of said real estate, if knocked off to him at said bids, and was to have said purchase money applied first to the discharge of said vendors' liens. Defendant also claims that he stated at the time the advertisement of sale was mentioned that he would not buy the lands at all, subject to said liens. Depositions were taken in the cause both for plaintiff and defendant, and several of those taken for defendant were excepted to by defendant Hays, so far as they related to a parol agreement between Collins and exceptor, or exceptor

and R. F. Kidd. A decree was rendered holding that the plaintiff was entitled to recover from the defendant the amount of his purchase-money notes, with their accrued interest, without allowing him to apply any portion thereof to the extinguishment of said vendors liens, and directing that unless the defendants, Spencer Collins, S. A. Hays, and A. S. McQuain, should pay to the plaintiff, R. G. Linn, trustee, four thousand and ninety three dollars and eighty-six cents, with interest thereon from the 4th of February, 1898, until paid, within thirty days from the rise of the court, that certain special commissioners therein named should advertise and sell said property upon the terms and in the manner therein indicated. From this decree said Collins obtained this appeal.

The question presented for our determination in this cause is whether the appellant was entitled to apply a sufficient portion of the purchase money bid by him for said real estate to extinguish the vendors' liens existing against said property to secure the balance remaining unpaid by said Kidd, and, as to his claims against Kidd, to a pro rata with the other creditors as to the residue of the purchase money. I can see nothing inequitable that would result from allowing Collins to pay off said vendor's liens. He seems to have bid a fair price for the property, without reference to the vendors' liens existing thereon. In the notice of sale, said trustee gave a general description of said lot and interest in the Reed farm, and remained silent as to the vendors' liens existing against them. Now, if Kidd had sold and conveyed this property himself, with the same general description, for the purpose of raising money to discharge his indebtedness, he would not thereby have deprived the owners of these vendors liens from enforcing their liens against the property. Can we say that by conveying to Linn, trustee, he conferred upon him the right to sell said property free from said liens? In other words, could Kidd confer upon said trustee more than he himself possessed? Kidd's creditors had a right to satisfaction out of his property, subject to the valid liens existing thereon. Collins himself appears to have been one of Kidd's largest creditors. This was a very different case from that of *Fleming* v. *Holt*, 12 W. Va. 143, in which there

was a deed of trust executed to a trustee to secure the payment of a particular debt therein described; while in the case at bar there was a general assignment by Kidd for the benefit of all of his creditors,—Collins among the number. 2 Beach., Mod. Cont. § 1246, thus states the law: "Under a general assignment for the benefit of creditors, the assignee takes the choses in action of his assignor, not as a purchaser for value, but as a volunteer, and therefore subject to all the defenses and equities existing against them in the hands of the assignor. The assignee is the mere representative of the assignor and his estate, and stands in his shoes." Burrill, Assignm. (page 517, § 374), says: "The maxim *caveat emptor* does not apply to the case of a sale by assignees for the benefit of creditors, whether the property be real or personal. And where an assignee under a voluntary assignment for the benefit of creditors sold at public sale a tract of land which had been purchased by the assignor under articles of agreement duly recorded, and in the advertisement it was described generally as a tract of land belonging to the assignor, it was held that the purchaser at the assignee's sale was entitled to a deduction from the purchase money of the amount due the original owner." Suppose Collins is allowed, out of said purchase money, to pay off the vendors' liens on said lot and tract of land; could R. F. Kidd or his creditors say that they were prejudiced thereby? Linn, in making the sale, surely did not sell more than Kidd owned at the time the assignment was made. All parties had notice and understood that a balance of purchase money was secured by vendors' liens reserved thereon, and if the property was sold for an adequate price without reference to said liens, as it appears to have been, the creditors would obtain the benefit of all that Kidd was entitled to if these liens were discharged by Collins out of the purchase money. Without reference to the testimony which seems to be somewhat conflicting, I am of opinion that, as a matter of equity, the appellant had the right to pay off said vendors' liens, and, to that extent, was entitled to a credit on his purchase money notes executed to said Linn, trustee, and that S. A. Hays and the other creditors of Kidd were not entitled to participate in the pro rata distri-

bution of the proceeds of said sale until the amount necessary to pay off and discharge said vendors' liens was deducted therefrom, and Collins allowed to apply the same in discharge thereof. For these reasons, the decree is reversed and the cause remanded.

Reversed.

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CHARLESTON.

BOGGESS *et al.* v. TAYLOR.

Submitted June 22, 1899—Decided December 2, 1899.

INSTRUCTION—*Reversal Verdict.*

Whenever a correct instruction is refused, the judgment will be reversed, unless the appellate court can see from the whole record that, even under the instruction, a different verdict could not have been rightly found. (p. 258.)

Error to Circuit Court, Mingo County.

Action by Boggess, Darst & Boggess against G. W. Taylor. Judgment for defendant, and plaintiffs bring error.

Affirmed.

R. H. HOYLE, for plaintiffs in error.

H. K. SHUMATE, for defendant in error.

MCWHORTER, JUDGE:

This is an action of *assumpsit*, by Boggess, Darst & Boggess against G. W. Taylor, in the circuit court of Mingo County, upon a note for two hundred and fifty dollars, made July 11, 1893, by said Taylor, payable three months after its date to the order of A. E. Kinnison at the

Bank of Williamson. Defendant pleaded nonassumpsit, and tendered a special plea in writing, averring that said note described in the declaration was obtained from the defendant by the payee, A. E. Kinnison, by fraud and circumvention,—that is to say, that said note was given by defendant for and in consideration that the said A. E. Kinnison would forthwith, or in ten days from the day on which said note was executed, deliver to the defendant, at the town of Matewan, a station on the Norfolk & Western Railroad, in said Mingo County, one saw mill, boiler, and fixtures thereto belonging of the value of two hundred and fifty dollars, and defendant trusting, believing, and confiding in the agreement, promises, and solemn declarations of said Kinnison, that he would so deliver the said sawmill, engine, boiler, and fixtures at the time promised, he executed the said writing; that said Kinnison did not comply with and fulfill his solemn promises and agreements in delivering the said sawmill, engine, boiler, and fixtures at the time agreed upon, nor at any other time, though often requested so to do, and that said Kinnison has not to this day delivered the said sawmill, engine, boiler, and fixtures, or any part thereof. And, further, that said note sued upon in said declaration was assigned to plaintiffs by Kinnison on the 16th of May, 1896, more than two years after the maturity of the note; that at the time of said assignment said note was not a negotiable note, and is, therefore, subject to all the equities that ever existed between the said defendant and Kinnison; and denied that the note was assigned to plaintiffs before its maturity, as alleged in the declaration,—to the filing of which plea plaintiffs objected. The objection was overruled, and plea filed, and plaintiffs replied generally to same. On the 8th of January, 1898, a jury was duly impaneled, and defendant asked leave to amend his special plea, which was granted. Defendant tendered his amended plea, to the filing of which plaintiffs objected, which objection was sustained, and the court refused to allow the same to be filed, to which ruling of the court defendant excepted. The jury, having heard the evidence and arguments of counsel, returned a verdict for the defendant. Plaintiffs moved the court to set aside the verdict as being contrary to the law and the evidence, which

motion the court overruled and rendered judgment on the verdict, to which rulings of the court plaintiffs excepted, and prayed that their exceptions be saved to them, which the order shows was done, and that five bills of exceptions, numbered one, two, three, four, and five, were signed, sealed, and made part of the record.

The first assignmennt of error is that the instrument sued upon is a negotiable note in the hands of a third party, a *bona fide* holder for value, before maturity; and the court allowed the defendant to plead failure of consideration or equitable offset, and upon that ground defeat the payment of the note. The plea is sufficient, as it avers that the note was assigned some two years after its maturity, and was taken subject to all the equities that ever existed between the maker and payee, and pleading failure of consideration. The plea raised an issue involving the question whether the purchase of the note was before maturity, which should be submitted to the jury. *Wiggins* v. *Kirkpatrick*, 114 N. C. 298, (19 S. E. 152). Appellant argues that the burden of proof is on the defendant to show that the note was transferred after maturity, or that the plaintiffs were not the bona fide holders for value; that the record is absolutely silent as to the date of transfer, and the evidence shows that it was made for a valuable consideration, which was proved by Kinnison, who was there the witness of defendant, and he will not be permitted to contradict him. True, it is only proven by Kinnison, but, according to the record, he was introduced twice in the trial as a witness, and both times by plaintiffs, and surely his interests are antagonistic to defendants.

Appellants cite *Organ Co.* v. *House*, 25 W. Va. 64, in support of their contention that the consideration was under a different contract than that contended for by defendant, and assume from the very circumstances of the case that this Court cannot fail to realize from the evidence that the immediate consideration of the note sued upon was the cancellation of an outstanding obligation of defendant, given or made in this same transaction, which is claimed in his evidence by Kinnison, but is denied by defendant, Taylor, and witness Tiller, who both positively state that the consideration was the promised shipment of boiler,

belting, smokestack, and fixtures. As to what the consideration was, was a question of fact or the jury.

Third. That the court erred in refusing to exclude the evidence on motion of plaintiffs, and direct a verdict for them, as set out in bill of exceptionss No. 3. The fact is, from Kinnison's own testimony it is quite evident that plaintiffs are not the bona fide holders of the note, sued on, but simply have it for collection for Kinnison, and the jury are justified in so finding. Kinnison, in a sort of equivocal way, says it belongs to the plaintiffs; that he assigned it to them without recourse, on their verbal promise to pay him the face value of the note, two hundred and fifty dollars. "Q. That is, when they collect it? Ans. No, sir; their promise to pay it. Q. They have never paid you anything for it? Ans. Nothing other than this promise. Q. Is that promise in writing? Ans. No, sir. Q. Their promise that, if they collect it, they were to pay you two hundred and fifty dollars? Ans. This is a collection agency, and this claim—I sold it to them outright, and assigned it to them for its face value, giving them the interest to collect it, without recourse. Q. You merely are giving them the interest to collect it? Ans. Yes, sir."

Fourth. The court erred in refusing to give the instruction asked for by plaintiffs as set out in bill of exceptions No. 2, which instruction is as follows: "The court instructs the jury that, if they believe from the evidence that A. E. Kinnison, representing Turley & Co., sold M. D. Tiller certain machinery, and that Tiller paid for it by giving drafts of the Little Kanawha Lumber Co., indorsed by the defendant G. W. Taylor, and that one of said drafts was afterwards protested, and that Kinnison was the legal holder of said draft, and that defendant took up same by giving his note for same, that they cannot take into consideration any failure to comply with the original contract with Tiller." While, in view of the evidence tending to show the taking up of the draft by defendant to be the direct or immediate consideration for the note sued upon, it might not have been error to give the instruction, yet it plainly appears from the whole record that, if it had been given, it could not have influenced the jury to render a different verdict. In *Davis* v. *Webb*, 46 W. Va. —, (33 S.

E. 97) (Syl., point 2): "Whenever a correct instruction is refused, the judgment will be reversed, unless the appellate court can see from the whole record that even under correct instructions a different verdict could not have been rightly found, or unless it is unable to perceive that the erroneous ruling of the court could not have influenced the jury." *Bank* v. *Waddill*, 27 Gratt. 451; *Nicholas* v. *Kershner*, 20 W. Va. 251.

The record shows that five bills of exceptions were signed, sealed, and made a part of the record, but only Nos. 1, 2 and 3 appear in the record. I see no reversible error in the judgment, and the same is affirmed.

Affirmed.

CHARLESTON.

HUNTER v. TOLBARD.

Submitted Sept. 9, 1899—Decided Dec. 2, 1899.

1. CONTRACT. *Intoxication Void Demurrer.*

Where a plaintiff in his bill alleges that he was induced to sign a contract while in a state of intoxication to such a degree as not to know the true intent or meaning of the same, such contract is not only voidable, but absolutely void, on demurrer. (p. 262.)

2. CONTRACT—*Good Faith—Partners—Fraud.*

Where such bill alleges that the contract so obtained was in violation of the rights and good faith which should prevail between partners, and charges that the same was obtained through fraud, and for the purpose of delaying and defrauding the plaintiff from obtaining his full rights in said copartnership, it is error to sustain a demurrer to such bill.

(pp. 260-261-262.)

Appeal from Circuit Court, Tucker County.

Bill by E. C. Hunter against W. S. Tolbard. Decree for defendant, and plaintiff appeals.

Reversed.

H. J. WAGONER and A. J. VALENTINE, for appellant.

CUNNINGHAM and STALLINGS, for appellee.

ENGLISH, JUDGE:

On the 18th of February, 1895, Tolbard and Hunter entered into an agreement in writing by which said Tolbard contracted to let Hunter have one-half interest in all the lumber outfit belonging to the Bartlett camp, four pairs of horses, and the camp outfit and wood tools, including everything; Hunter agreeing to pay Tolbard one thousand dollars for the one-half interest, and to receive one-half of the profits of work done with said outfit. The one thousand dollars mentioned was not to be taken out until the business was in shape to pay it, and Hunter was to have a salary of two dollars per day for running the job. On the first Monday in February, 1898, Hunter filed his bill in the circuit court of Tucker County against Tolbard, in which he stated, among other things, that he was a practical lumberman, and had the reputation of being a successful one in that portion of the State; that in February, 1895, he entered into a partnership with defendant, at his solicitation, for carrying out the terms of an agreement defendant had with the Blackwater Lumber Company for furnishing logs, etc., and paid defendant one thousand dollars for one-half interest in said contract, upon terms set forth in said agreement; that he entered upon his duties under said contract, which proved a very profitable one; and that on the 3d of April, 1897, having received but a small part of the profits arising from said work, he went to the defendant, and asked for a settlement, so that he could receive the profits then due him, but defendant refused to settle, and plaintiff being intoxicated, went home. Shortly afterwards, the defendant came to him with an agreement, already prepared, stating that plaintiff must sign it, and then they would settle; and the plaintiff, being much intoxicated, unfit for business, very much in need of money, and

without knowing the true import of said agreement, signed the same. whereupon they entered upon a pretended partial settlement, and plaintiff received one thousand eight hundred dollars on account of his share of the profits. Plaintiff states, further, that he subsequently learned that the terms and conditions of said agreement were that if either of the parties should at any time thereafter become intoxicated, and absent himself from the work of carrying out said contract, such person so becoming intoxicated, and absenting himself for any length of time, should lose his entire interest in said contract, and forfeit to the other ten cents per one thousand feet as the plaintiff understood, but as defendant now claims fifty cents per one thousand feet; that said agreement was signed at the defendant's hotel, in the town of Davis, in the saloon of which plaintiff received part of the liquor which intoxicated him; that from this time until the 6th of October, 1897, he continued to work on said contract, under the terms of said agreement, when he again became intoxciated, when the defendant again called at his room in said hotel, and claimed that the partnership was at an end, under the terms of said agreement of April 3, 1897, and demanded that plaintiff should turn over to him all his rights and interest in said co-partnership, and forfeit all further right and interest therein, and claimed that plaintiff was further indebted to him in the sum of six hundred and seventy-eight dollars and forty cents, which sum plaintiff paid him in cash; and that since that time the defendant has placed other persons in charge of said business, and completely ousted him from participation therein or control of same, although he has been sober since the 12th of October. and at all times ready to perform his part of said agreement. The plaintiff also avers and charges that the agreement of April 3, 1897, having been obtained from him while he was intoxicated, and under such conditions as to amount to duress, and in violation of the rights and good faith which should prevail between partners. and its execution having been obtained through fraud, and for the express purpose of hindering, delaying, and defrauding the plaintiff from obtaining his full rights in said copartnership, he has the right to have the same cancelled and declared void, and to

be restored to all his rights and privileges, and that defendant should be compelled to account to him for his full equitable one-half of the profits of said contract, and that his one-half interest therein be returned to him, together with said six hundred and seventy-eight dollars and forty cents paid by him to defendant in October, 1897, in addition to the sum of two dollars per day and the board of plaintiff while so engaged in the conduct of said business, less the half of the actual loss that may have been sustained, and that, if necessary, a receiver of said business should be appointed by the court to take charge of and conduct the same until such time as these matters might be satisfactorily settled through the aid of the court. The plaintiff also prayed that the cause might be referred to a commissioner to settle said accounts, and that he might have a personal decree for the amount due him under the terms of said co-partnership, and for such general and special relief as he might be entitled to. To this bill the defendant demurred, the demurrer was sustained, and the bill dismissed. From this action of the court the plaintiff appealed.

The question presented by the record and pleadings is whether the plaintiff by his bill has made such a case as entitles him to relief in a court of equity. As a matter of course, upon demurrer, all matters which are properly pleaded must be taken as true, and the demurrant simply says, conceding all of the allegations in the bill to be true, the plaintiff is not entitled to relief in a court of equity. Now, the plaintiff says that he had worked under his partnership contract with defendant until the 3d of April, 1897, when there was more than one thousand eight hundred dollars due him, and about that time he demanded a settlement, but defendant refused to settle; that on that day, when plaintiff was badly intoxicated, in great need of money, and without knowing the true intent of the agreement brought to him by defendant, already prepared, he signed the same, which he charges was changed in important particulars after it was signed; that the manner in which the agreement was forced on him amounted to duress; that it was in direct violation of the good faith which should prevail between partners, and was obtained through

fraud, with intent to hinder him from obtaining his full rights and privileges in the partnership. It is also apparent, from the terms of said agreement, set forth in the bill, that it was not contemplated that the defendant was to give his personal attention to this lumber business, but that it was to be intrusted to the plaintiff, a man of practical experience, so that the language of said agreement above quoted clearly indicates that the same was a scheme to get rid of plaintiff, and obtain a considerable share of the profits of the business, when there was no corresponding risk on defendant's part, as he was at all times absent from the work. The plaintiff also alleges that on the 6th of October, 1897, he again became intoxicated; whereupon the defendant again called him into his room at the hotel, demanded a settlement, and declared said partnership at an end under said agreement of April 3, 1897, and that plaintiff should turn over to him all of his interest in the partnership property, and claimed that plaintiff was indebted to him six hundred and seventy-eight dollars and forty cents, which he paid him in cash. Plaintiff also alleges that he became sober on the 12th day of October, 1897.

As to the allegation in the bill that the plaintiff was intoxicated at the time he signed the agreement of April 3, 1897, and from that cause was incapacitated from making a contract, we find the law thus stated in 3 Minor, Inst. pt. 1: "Where a fraudulent advantage is taken of drunkenness: This is so direct and palpable a fraud as always to render the transaction voidable in all the courts, whether of law or equity,"—citing numerous authorities, and among them *Reynalds* v. *Waller's Heir*, 1 Wash. (Va.) 164; *Harvey* v. *Pecks*, 1 Munf. 518. The author also says: "Where the drunkenness is so total as to have deprived the party of his reason and of an agreeing mind: In this case, without any reference to any question of fraud, there being an absolute want of understanding, without which there can be no contract, the transaction, whatever it may be, is not, as in other cases, voidable, only, but wholly void." On this point, see, also, 2 Pom. Eq. Jur. § 949; Bish. Cont. § 980; 11 Am. & Eng. Enc. Law, 773.

The facts alleged in the bill must be regarded as true on demurrer, and, in my opinion, are sufficent, if proven, to

entitle the plaintiff to the relief prayed for. The decree complained of which sustains the demurrer must be reversed, and the cause remanded.

Reversed.

CHARLESTON.

ARBOGAST *et al* v. MCGRAW *et al.*

Submitted June 23, 1899—Decided December 2, 1899.

1. COURTS—*Discretion—Commissioners Removal.*
   The circuit court has absolute control over its commissioners, with the power to appoint and remove at its discretion; and unless such discretion is plainly abused, to the prejudice of the parties to the litigation, the court cannot interfere therewith. (p. 264.)

2. COMMISSIONER'S APPEAL.
   A special commissioner removed by the circuit court without notice or good cause shown cannot appeal from the decree removing him. (p. 264.)

3. COMMISSIONER'S REPORT—*Exceptions—When Taken.*
   Unless exceptions are taken to a commissioner's report auditing an account in the circuit court, no appeal will lie from the decree confirming the same, as section 7, chapter 129, of the Code, as amended in chapter 43, Acts 1897, authorizes the making of such exceptions "at the first term of the court next after the term to which the same is filed, or by leave of the court at any subsequent term." (p. 265.)

Appeal from Circuit Court Pocahontas County.

Bill by J. C. Arbogast against John T. McGraw and others. From the decree, and from an order dismissing R. S. Turk as special commissioner, Turk and plaintiff appeal.

Affirmed.

BROWN, JACKSON and KNIGHT, for appellants.

PAYNE & PAYNE, REVERCOMB & MCALLISTER, and H. L. GARRETT, for appellees.

DENT, PRESIDENT:

R. S. Turk appeals from two decrees of the circuit court of Pocahontas County in the chancery causes of R. S. Turk, special commissioner, and others, against John T. McGraw and others, bearing date respectively on the 19th day of June, 1897, and on the 9th day of October, 1897, and assigns errors as follows, to wit:

First. The setting aside of the agreed decree of June 19, 1897. This was done at the same term when the whole matter was in the breast of the court.

Second. In dismissing petitioner as special commissioner from the causes without notice, and in dismissing him at all. The circuit court has absolute power over the appointment and removal of its commissioners. And, as long as no litigant complains thereof or is aggrieved thereby, it may appoint and remove them at its pleasure, with or without cause for so doing, and this court has no appellate jurisdiction therein. Neither is such commissioner a party to the suit, nor has he any right to appeal from a decree removing him. The circuit court's method of removing him may be highly reprehensible, and apparently unjust to him, in removing him without notice or hearing; but it is a rule unto itself in such matters, and is subject to the control of no higher authority.

Third. In appointing a special receiver in the causes without notice to J. C. Arbogast, administrator of William Skeen, deceased. This is a matter in which the circuit court has a nonappealable discretion, and unless such discretion is plainly abused this Court will not interfere. It is also a matter about which the appellant has no right to complain. He is not a party to any of the causes, except as special commissioner, and this commissionership has been taken from him.

Fourth. In ordering a sale of the lands in the suits without requiring the special commissioners to give bond, and in undertaking to sell by joining the receiver with the commissioners, and substituting his bond, as seems to

have been done or attempted. This is another matter of which the appellant has no right to complain.

Fifth. In entering any decree after the agreed decree of the 17th, and especially in the absence of all but one of the counsel. The disposal of the preceding errors disposes also of this.

Sixth. In dismissing the petition filed by petitioner at the October term of said court, 1897. This was a petition filed solely for the purpose of being reinstated as special commissioner. The court had the discretion to reject it, and from such discretion there is no appeal.

Seventh. In confirming the report No. 6 of Commissioner Scott, and in its condition acting on it at all. Eighth. In decreeing against this petitioner any sum of money without a day in court, and especially in decreeing a sum based on Commissioner Scott's report. Ninth. In decreeing against petitioner, as special commissioner, the sum that was decreed. These three last assignments are subject to the same answer: There have never been any exceptions filed to Commissioner Scott's report in the circuit court. Section 7, chapter 129, of the Code, as amended in chapter 43, Acts 1897, provides that "any party may except to such report at the first term of the court next after the term to which the same is filed, or by leave of the court at any subsequent term thereof." If the appellant has any just exception to such report, he may yet take advantage of it in the circuit court, and until he has done so he cannot appeal to this court. He must exhaust his rights without relief therein first.

The assignment of error by J. C. Arbogast, administrator, that he is unjustly deprived of his commissions, amounting to three hundred and ninety dollars and forty-one cents, and other expenses, is also a matter that has not been properly presented to, and passed on by the circuit court.

It is therefore plain that while the appellants may have serious grievances against the circuit court and the opposing counsel, connected with this litigation, they have no just legal grounds for an appeal to this court. The decrees are affirmed.

Affirmed.

CHARLESTON.

STATE v. KERNS.

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Submitted Sept. 9, 1899—Decided Dec. 2, 1899.

1. INSTRUCTION—*Opinion.*
Instructions given by the trial court, on its motion, in a felony case, which may convey to the jury the opinion of the court as to the guilt of the accused, are improper. (p. 269.)

2. INSTRUCTIONS—*Evidence.*
Instructions asked by the accused which properly propound the law, are justified by the evidence, and present to the jury a phase of the case not presented in other instructions, should be given, and it is reversible error to refuse them. (p. 272.)

Error to Circuit Court, Tucker County.

Fred D. Kerns was found guilty of murder, and brings error.

Reversed.

W. H. KELLEY and J. P. SCOTT, for plaintiffs in error.

EDGAR P. RUCKER, ATTY. GEN., WM. G. CONLEY and E. M. KEATLEY, for the State.

DENT, PRESIDENT:

At a circuit court held for the county of Tucker on Thursday, the 22d day of June, 1899, Fred D. Kerns, on the verdict of a jury, was sentenced to the penitentiary for the period of his natural life for killing Lucy Day. His defense was, "Not guilty." The facts are as follows: The prisoner and the deceased were lovers. She was single. He was married, but had been some time parted from his wife, from whom he was seeking a divorce, with the ostensible object of marrying the deceased. She believed him to be single, and expected him to marry her. Their intimacy had continued for a considerable period, and resulted in sexual cohabitation between them. At the time of her death he was visiting at her parents' home, and

they occupied the same room and bed. She was pregnant. About twenty minutes of twelve o'clock, midnight, the report of a revolver was heard in their room. Mrs. Day, her mother, immediately entered the room, and found her lying on the bed, and the prisoner standing up. He said: "Mother, Lucy has shot herself. Oh, what shall I do? Oh, my God! what have I done?" To the brother coming in, he says: "Riley, here is the revolver. Shoot me, shoot me, shoot me." The prisoner stated that he was asleep, when the report of the revolver awakened him, and Lucy fell back on him; that he immediately got up, laying her back on the bed, and then her mother came in. The revolver belonged to Lucy, who kept it loaded in her trunk, with the key tied to a string around her neck. It is evidenced by one witness that on that evening he saw her take it out of her trunk and hide it about her person. The wound was directly over her heart, was burned and blackened with powder, and no blood flowed therefrom, while she lay as if sleeping. The revolver was found lying on the bed. There are many other little matters of detail brought out in the evidence which are not necessary to repeat here, as no comment on the weight of the evidence is intended. The question submitted to the jury was as to whether she committed suicide, or was killed by the prisoner.

At the instance of the state the court gave the following instruction, to which the prisoner objected, to wit: "The court instructs the jury that the term 'reasonable doubt' does not mean every vague conjectural doubt, but it is a substantial doubt—a reasonable hypothesis—arising from the evidence or lack of evidence inconsistent with the theory of the defendant's guilt." The court refused the following instruction asked by the prisoner: "The court further instructs the jury that, if any one of the facts necessary to show the guilt of the defendant is consistent with his innocence, then the jury must acquit." These instructions are equally intelligible to a jury composed of ordinary men and too many lawyers, and there is no good reason why the jury should not have them. If they have doubts of their meaning, they should give the prisoner, and not the state, the benefit of the doubt. With this under-

standing, it does not appear even doubtful that either the giving or the withholding of either of these instructions would deprive the prisoner of a fair trial. They both apparently propound the law correctly to a jurist, when carefully sifted and rightly understood, but what effect they might have to mislead and puzzle the mind of a juryman is beyond the pale of judicial discernment. The last instruction is easily understood to mean that, if there is a weak link in the chain of evidence necessary to convict, the prisoner is entitled to the benefit of the doubt thereby raised. This is undoubtedly true, and the instruction properly propounds the law; and the court, having given the state's instruction, should have given the prisoner's. The jury could as easily understand the one as the other, and thus arrive at the true hypothesis. *State* v. *Flanagan*, 26 W. Va. 117.

When the jury was about to be sent to its room, "the court, on its own motion, taking the indictment in his hand, instructed the jury in the following words, to wit: 'Gentlemen of the Jury: I think it would be proper for me to say to you that, if you should find the defendant guilty of murder in the first degree, you could further determine the mode of punishment, and say whether it should be by death, or confinement in the penitentiary for life. If you should determine that he ought to be confined in the penitentiary, you will make that a part of your finding and of your verdict. You can, under the indictment, find the defendant guilty of murder in the second degree.' Thereupon, the jury being about to retire, the counsel for the defendant suggested to the court that he ought also to say to the jury that the jury could find the defendant not guilty; and thereupon the court said to the jury: 'Of course, gentlemen, you could find the prisoner not guilty at all, if you thought the evidence justified such a finding; but in all your findings you must be governed by the evidence.'" To these remarks of the court the prisoner objected. These words might be very harmless, or they might be disastrous to the prisoner, according to the accent and manner of the court in using them. They might very easily be made to convey the sense that the court was fully convinced of the guilt of the prisoner, and for the

jury to find otherwise they must disregard the evidence. Manner and accent cannot be made part of the record, and such language, uttered at the time it was, could be made very suggestive to the jury,—at least, from which they could draw their own inferences as to the opinion entertained by the court. Hence the rule that, if such instructions or remarks may have prejudiced the prisoner, they are sufficient grounds of error to justify the granting of a new trial. *State* v. *Staley*, (W. Va.) 32 S. E. 198; *Neill* v. *Produce Co.*, 38 W. Va. 228, (18 S. E. 563); *State* v. *Cobbs*, 40 W. Va. 721, (22 S. E. 310); *State* v. *Sutfin*, 22 W. Va. 771; *State* v. *Greer*, *Id.* 800; *State* v. *Hurst*, 11 W. Va. 54; *McDowell's Ex'r* v. *Crawford*, 11 Gratt. 405. In *Dejarnette* v. *Com.*, 75 Va. 867, it was held that "no remarks which have a tendency to intimate the bias of the court on the character or weight of the testimony should be indulged in by it." "The right to a decision on the facts by the jury uninfluenced and unbiased by the opinion of the judge has been deemed worthy of a constitutional guaranty. It cannot be lawfully denied by the simple evasion of looking at the counsel, instead of at the jury." *State* v. *Harkin*, 7 Nev. 381. "From the high and authoritative position of a judge presiding at a trial before jury, his influence with them is of vast extent; and he has it in his power, by words or actions, or both, to materially prejudice the rights and interests of one or the other of the parties." *McMinn* v. *Whelan*, 27 Cal. 300, 319. The trial judge should exercise great care not to intimate in any manner his opinion upon any fact at issue. He cannot do so directly or indirectly, neither explicitly nor by innuendo. *State* v. *Dick*, 60 N. C. 440; *State* v. *Ah Tong*, 7 Nev. 152. Words in themselves may be harmless, while accent and manner may make them deadly. It was proper for the court to say that, if the jury believed the prisoner not guilty, they had the right to so find; but to intimate to them in any manner, by words, conduct, or accent, that such finding on their part was not justified by the evidence by which they must be governed, was improper, and prejudicial to the prisoner's guaranteed right of a fair trial.

The judge refused to give three several instructions in the following words, asked by the prisoner, to wit: "Be-

fore the jury can convict the defendant, it must be shown beyond a reasonable doubt that Lucy Day did not kill herself, and that the defendant did kill her." "Unless the evidence proves beyond any reasonable doubt that the prisoner killed the deceased, Lucy Day, and that said Lucy Day did not kill herself, then the jury must acquit the defendant." "The court further instructs the jury that if, after considering all the evidence and circumstances, they have a reasonable doubt as to whether the defendant, Kerns, shot and killed the deceased, or whether she shot and killed herself, then they must give the defendant the benefit of such doubt, and acquit him." The state insists that it was not an error to refuse to give these instructions, for the reason that there was no evidence justifying them, and because the usual reasonable doubt instructions had been given. The object in offering these instructions, no doubt, was to bring plainly to the attention of the jury the question as to whether Lucy Day had committed suicide. The instructions in themselves were right, for, if the jury had a reasonable doubt in their minds as to whether the deceased had committed suicide, then they necessarily had the same reasonable doubt as to whether the prisoner killed her. If the prisoner had asked the court to instruct the jury that unless they believed from the evidence, beyond a reasonable doubt, that Lucy Day did not shoot herself, they must acquit the prisoner, the court would have been bound to give it, because, if she shot herself, he did not shoot her. The instructions asked were simply to this effect, and there is apparently no excuse for their not being given. The prisoner had the right to have the question of suicide fairly presented to the jury, as there is much evidence tending to sustain it. There is no question but that a married man who deceives and seduces under the promise of marriage an innocent and confiding girl, and drives her to suicide, is worthy to suffer the highest punishment known to the law. Our laws are not so written, but this most heinous offense against society is allowed to go comparatively unpunished, for which the more righteous laws of the ancient Hebrews inflicted the death penalty. Too often the jurors of this country, actuated by a sense of natural justice, forget

the limitations of the laws by which they are governed, and, in their anxiety to punish an offender against the higher laws of moralty and decency according to his just deserts, inflict on him for a wrong the law does not punish the penalty for a crime of which he is not guilty. What more natural is it for a jury to say in a case of this character: "Lucy Day may have killed herself, and we have the most serious and reasonable doubts as to that fact; but this prisoner deceived her, seduced her, robbed her of everything worth living for, and drove her to the maddening crime of suicide to hide her shame and prevent her unborn offspring from being bastardized. Doubts or no doubts as to his guilt, he should suffer the full penalty of the law." And while all honorable men might hold up their hands and say: "So say we all. The verdict is a righteous one,"—yet the courts of the land must be governed by the laws of the land, which speak in no uncertain terms. If Lucy Day took her own life, it matters not what her provocation may have been, or how cruelly wicked and wrongful may have been the conduct of the prisoner in driving her to such a course, yet he cannot be punished for her death, but he must be remitted to the bar of that higher court whose judgments are infallible. The refusal to give these instructions cannot be accounted for except upon the theory that the trial court deemed him worthy of punishment, and that the burden was upon him to show that Lucy Day did commit suicide, and not on the State to show that she did not. They are, however, so interchangeable that to disprove one we must prove the other, and to prove one disprove the other. A reasonable doubt about one is a reasonable doubt about the other. It may be argued that the instruction given was therefore sufficient, as it necessarily involved those refused. The given instructions made no reference to the matter of suicide, and for this very reason the jury may have considered it abandoned, and given it little or no consideration. Hence the prisoner had the right to have the matter of suicide brought prominently to the attention of the jury by proper instructions. He asked for these, and the court refused to give them. This was error by which he might be prejudiced, and this court is unable to

say that he would not be. If a court is asked to give a proper specific instruction, it must do so, unless such instruction is fully and completely met by other instructions given. *State* v. *Cobb*, 40 W. Va. 718 (22 S. E. 310); *State* v. *Allen*, (W. Va.) (30 S. E. 209); *State* v. *Musgrave*, 43 W. Va. 672, (28 S. E. 813); *State* v. *Evans* 33 W. Va. 417 (10 S. E. 792).

There are some other grounds of error relied upon, which are, however, of minor importance, compared with the foregoing, and which on a retrial may be determined rightly, or prove unnecessary. The judgment is reversed, the verdict of the jury set aside, and a new trial awarded the accused and the case remanded for this purpose.

BRANNON, JUDGE:

I concur in Judge DENT'S ruling as to the instructions, except that one given by the judge. Adhering to opinions heretofore written by me, I do not regard that instruction as error. I intimate no opinion as to the guilt or innocence of the accused.

MCWHORTER, JUDGE:

I concur in the conclusion that the judgment should be reversed, the verdict set aside, and a new trial granted, and fully agree that "no remarks which have a tendency to intimate the bias of the court on the character or weight of the testimony should be indulged in by it," as held in *Dejarnette* v. *Com*, 75 Va. 867; but contend that, in the absence of objections or exceptions entered to the "accent and manner of the court in using" such words or remarks, the appellate court cannot assume that the trial judge, either by accent or manner in the use thereof, may have suggested to the jury his bias as to the weight of the evidence. It must be presumed that the remarks made or words spoken by the court were without bias one way or the other, and there should not be attributed to them a meaning which the words themslves do not impart.

BRANNON, JUDGE, concurs in this note.

Reversed.

CHARLESTON.

WEST VIRGINIA & P. R. CO. *v.* HARRISON COUNTY COURT.

Submitted June 10, 1899—Decided December 2, 1899.

1. RAILROAD AID—*Condition Precedent—County Bonds.*

If a proposal submitting to a vote of the people a subscription to aid the construction of a railroad provides that it "shall not be available or paid to the said railroad company until the roadbed of the same shall have been completed ready for the ties and rails," it is a condition precedent, and of the essence of the proposal and contract under it, and there is no right in the company to payment prior to such completion. The count court has no power to issue bonds under such subscription, and place them in hands of a third party, to be delivered to the company on such completion, in advance of such completion; and the deposit in escrow does not enlarge its rights, and it has no vested right under the deposit, because of such deposit, in advance of such completion of the road. (p. 273.)

2. SUBSCRIPTION FORFEITED—*Bonds Canceled.*

An order of the county court under a vote of the people making a subscription to the construction of a railroad directs bonds to issue in payment, and to be deposited with a bank, to be thereafter delivered to the railroad company upon the condition that it shall complete the road, ready for ties and rails, by a given day, with the proviso that if the road should not be completed by that day the subscription should be forfeited, and the bank should deliver back to the court such bonds, and the road is not so completed by the day given. *Held*, that the subscription is forfeited, and the court may reclaim the bonds from the bank and cancel them. (pp. 273-275.)

3. TIME—*Compliance—Subscription.*

A reasonable limit of time for the completion of a railroad in a subscription by a county to it is valid, and is of the essence of the subscription, and compliance with it is essential to entitle the company to the subscription. (p. 278.)

4. LIMIT—*Construction—Vote.*

A county court making a subscription to the construction of a railroad may insert a limit of time for its completion, or any terms and conditions reasonable and prudent to protect

the public, not contravening anything in the vote of the people or in the statute. (p. 277.)

5. TERMS—*Condition—Estoppel.*
A railroad company accepting a county subscription as made by a county court accepts it as tendered by the county court, with all its terms and conditions, and is estopped from saying that such terms and conditions are void or unreasonable. (p. 278.)

6. TIME—*Subscription—Forfeit.*
If a railroad company engage, in consideration of a county subscription to its work, to complete its railroad by a given time or forfeit the subscription, and fail therein, a court of equity will not relieve it from the forfeiture. (pp. 280-281.)

7. CONTRACT—*Relief—Equity.*
If one asks equity to relieve him from the consequences of his failure to perform his contract, in cases where such relief may be given, yet, if he does not aver and show clearly a present ability to perform, no relief will be given him. (p. 281.)

Appeal from Circuit Court, Harrison County.

Action by the West Virginia & Pennsylvania Railroad Company against the County Court of Harrison County. Decree for defendant, and plaintiff appeals.

Affirmed.

C. W. LYNCH and BENJAMIN WILSON, for appellant.

DAVIS and DAVIS, W. P. HUBBARD, and MELVILLE D. POST, for appellee.

BRANNON, JUDGE:

The county court of Harrison County submitted to its voters a proposition for the county to subcribe one hundred and fifty thousand dollars in aid of the construction of a railroad from the Pennsylvania state line to Clarksburg,—"said subscription not to be available or paid to the said railroad company until the road bed of the same shall have been completed ready for the ties and rails from the said Pennsylvania line to said town of Clarksburg," and on 17th of May, 1881, the voters approved the subscription. No particular corporation was named in the order submitting the question to the voters. On the 27th of May, 1884, the county court made an order stating that such subscription had been so approved, and that a corporation nam-

ed the West Virginia and Pennsylvania Railroad Company had undertaken the railroad, and appointing agents on the part of the county to make the subscription in behalf of the county. This order provided that the subscription should be paid in the bonds of the county, payable 1st of January, 1907, and prescribed the form of bond and coupons, and directed said agents to cause the bonds to be prepared as soon as possible, and directed the agents, after execution by the president and clerk of the court, to deposit such bonds in the custody of the Merchants' National Bank of West Virginia, provided said railroad company deposit with the same bank, for the county, certificates for one hundred and fifty thousand dollars of its stock. This same order provided that the bank should hold the bonds and stock on certain conditions,—among others, that it should be the duty of said agents, or such other persons as the court might appoint, to ascertain when the road was completed according to the terms of the subscription, and when they should certify to the bank and court that the construction of the road, ready for ties and rails, had been completed in good faith, then the court should order the bank to deliver to the railroad company the bonds, and at the same time to deliver to the county court said certificates of stock; and the order contained this proviso: "Provided, that should the said railroad company not comply with this subscription by completing its roadbed before the first day of January, 1887, ready for the ties and rails, this subscription shall be forfeited." It further provided that "in the event of such forfeiture the bank shall deliver up to the respective parties the bonds and stock aforesaid." The bonds and stock were deposited with the bank, and remain with it. Some little work has been done in the construction of the railroad, but it has never been made ready for ties or rails. The work done is merely nominal,—colorable. In September, 1888, three hundred and twenty-five voters and tax-payers petitioned the county court to rescind the order of the court making the subscription; but the court decided that "said order should not be rescinded, nor should said bonds be cancelled." A similar proposition was lost in December, 1888, before the court. As it was proposed by or for the

county court at its June term, 1898, to declare the subscription forfeited and cancel said bonds, the said railroad company filed a bill of injunction against the county court to restrain it from doing so, and, having obtained an injunction, the case was heard in the circuit court; and a decree was entered dissolving the injunction, declaring that the railroad company had forfeited its right to the subscription and to the bonds, and adjudging subscription and bonds null and void, and that the county court had the right to, and should upon delivery to it, cancel said bonds, and directing it to do so, and directing the bank to surrender them to the county court. From this decree the railroad company appealed.

At the outset a question presents itself, very material in the solution of this case. What power had the county court to prepare, issue, and deliver these bonds in escrow to the bank when the railroad had not been so far completed as to be ready for ties and rails? The statute provided that a county subscription should be paid in cash or in its bonds, and therefore bonds are per se payment of a county subscription. The vote of the people was that the subscription should not "be available or paid until the roadbed shall have been completed, ready for the ties and rails," from the Pennsylvania line to Clarksburg; plainly meaning that, while there could be the act of subscription, there could be no bonds—no right to make or deliver them absolutely or in escrow—until the road was ready for ties and rails. I fail to see any power in a county, under such a direction from the people and statute, to make any delivery in escrow so long before the day of payment. Take vote and statute together, and they say that only upon one event could the bonds be delivered,—that is, when the road should be ready for ties and rails,—and then an absolute delivery to the company as an actual payment. The company grants that it yet has no right to the bonds, but claims that this escrow somehow gives it a right to demand its continuance; but how can it rely upon rights under an escrow when there could be no escrow? The company could have no vested right to the bonds till the road was ready for ties and rails. The vote must not be departed from as to matters on which it speaks. When it fixes

terms and conditions it requires little authority to show that they must be observed. *Neale* v. *Wood County Court*, 43 W. Va. 90(27 S. E. 370). As there shown (page 104, 43 W. Va., and page 376, 27 S. E.), and below shown, where completion of the road is a precedent condition to delivery of bonds it is strictly enforced. It is clear law that there is no power in a county court to subscribe for the county without statute, and it must conform in doing so to the directions of the vote and statute in material matters. They are the chart of its authority. When a vote and statute say that bonds can be delivered only when the road is completed, the county court can act then—then only—in making delivery and payment. It cannot make delivery in escrow so as to vest any rights. Did the people intend that their bonds should be executed years in advance and deposited in escrow, so that if, by any means, they would get out into the world, they would have to pay them, or be endangered as to payment? Did they think they authorized bonds to mature in 1907, when the road might not be ready for ties until a year before their maturity? Surely it was not contemplated by them that taxes would be raised for interest and sinking fund before the road was ready for ties, but if not raised the whole principal might fall on them, to be paid within a few years, —a grievous load the people never dreamed of. They thought their bonds would bear date from the date when the road was ready for ties, and would mature in a given time thereafter, and not until then would the time of indulgence or taxes begin to run against them. The doctrine relied on by counsel, stated in 6 Am. & Eng. Enc. Law, 863, that one party to an escrow cannot revoke it and destroy another's right, is sound; but this rule presupposes a valid, lawful, binding escrow. But we find in the improved second edition of that work (volume 11, p. 352) that a depositary may and should redeliver on failure to perform a condition of the deposit. Therefore I cannot see how the company can claim any vested right under this deposit in escrow. The county court had the naked power to make delivery to the company of the bonds in payment of the subscription when the road was ready for ties, not to deliver in escrow years ahead.

After writing beyond this point I meet with the case of *Board* v. *Brush*, 77 Ill. 59, where bonds had been voted to a railroad, deliverable on its completion to a town, and the county court made an order for the deposit with three persons, in trust for the company, of certain bonds, undated, with power in them to date them of the date of delivery to the company, and deliver them on completion of the road. True, that order gave the trustees power to say when completion took place, whereas the Harrison court order has the prudent provision that it only could order the bank to deliver. But the reasoning of the Illinois court applies to this case. It says that the law and voters intended only the court to dispose of the bonds; that the court could not delegate the function of delivery to strangers owing no obligation to the county; that dangers to the public might ensue,—and condemned the action of the county court for such delegation of authority on general principles.

I observe that in *Satterlee* v. *Strider*, 31 W. Va. 781 (8 S. E. 552), a committee was appointed to take charge of bonds and deliver them as work progressed, they deciding when the company was entitled to them; but the point of power to constitute this committee was not in contestation. The case, however, supports the Harrison court in recognizing the right to revoke the escrow trusteeship. That deposit in escrow did not enlarge the rights of the company to those bonds. It does not—cannot—give it rights which it has not by the vote of the people. Its rights must be judged as if that deposit had never been made. It has no right to have these bonds kept in that bank, because the court had no right to make any deposit to enlarge the company's right beyond the vote of the people, and, further, because these are not such bonds as it would be entitled to, since these bear date in 1884, and mature 1st of January, 1907, whereas the bonds it would be entitled to would bear date at the completion of the road, running a prescribed period after completion, and none of the period before.

But say that I am in error in the opinion above. What then? I answer that the company has no right to prevent the county from taking up and destroying those bonds.

I need not give authority to show that, if the terms of the deposit in escrow control, the county has the right to do this; for it would be only a carrying out of the terms of deposit in escrow. 11 Am. & Eng. Enc. Law (2d Ed.) 352. Those terms say that if the railroad company should not complete its road, ready for ties and rails, by January 1, 1887, the subscription should be forfeited; the bank should surrender to the county its bonds, and to the company its certificates of stock. But it is strenuously contended that as the vote of the people fixed no date for the completion of the work, this limitation inserted by the county court is void,—an unwarranted condition superadded to the popular vote. As above stated, the vote, so far as it speaks, controls; and if the clause in the county court's order that the road must be finished by the 1st of January, 1887, at all contravened the vote, that clause would be void. But that vote is utterly silent as to time of completion. Is it to be unlimited time, the contingent liability arising from the subscription becoming at any time in many years to come an actual debt, without regard to changed conditions and circumstances? Harrison County wanted another railroad, competing with the Baltimore and Ohio Railroad, then its only means of outlet for the great wealth of coal and live stock enriching that fine county, and it wanted it then, or in a reasonable time; and if this company should fail, as it has for eighteen years since the vote, should the county be tied down from looking to another quarter for relief? It could not do so with this liability over it. There would be no mutuality in allowing the company indefinite, unlimited time. Reason and law unite in saying that, as the people had not fixed a limit, there must be some authority to do so. Reason says there should be a reasonable time. That was given. Statute law says that when the people have voted a subscription the county court shall make it "on such terms as they may deem advisable." Code 1891, chapter 39, section 24. What could more fitly fall within the word "terms" than imposing a reasonable limitation in time for the completion of the work, and prevent an embargo upon the county of indefinite duration? Counsel argues that section 58, chapter 54, Code, says that subscriptions shall be made "upon terms and conditions

specified in the order under which the vote is taken." That is where the vote fixes terms and conditions, not as to things material to protect the county in the transaction not touched by the order of submission. That order may insert conditions or may not. Section 24, chapter 39, authorizes the court to pass an order touching the proposed subscription, only requiring that it shall specify the work to which the aid is to be given, and the amount of that aid, but no further specifying what it shall contain, and simply submitting the question to the people, and then leaving details of terms and conditions to the court. The very section before section 58, on which the counsel relies, says that subscriptions shall be made as prescribed by section 24, chapter 39, and we have seen what it says. We must read both sections together. One says that the subscriptions shall be on such terms as the court deems advisable; the other, on such as the order of submission prescribes. We can harmonize the sections—give each an office—by saying that when the vote prescribes terms and conditions they must be followed, but, so far as the vote does not give them, the county court may. Section 57, chapter 54, not only says that a subscription to a railroad may be made in the manner prescribed by section 24, chapter 39, but adds that "all the provisions of said section shall be applicable to such subscription," thus including that clause giving the court right to fix terms. "When no conditions are required by law a municipal corporation may make the subscription on such terms as are deemed necessary to protect its own interest. The courts have uniformly held that an authority to subscribe for stock in aid of a railway includes authority to make a conditional subscription." Hainer, Mod. Law Mun. Sec. § 192; 2 Elliott, R. R. § 852, citing many cases.

The county court thus possessing power to fix terms not fixed by the vote, the only question is whether its terms are reasonable, since I do not suppose it can fix arbitrary terms, virtually depriving the railroad of the aid, and defeating the benefit designed for the people from the public improvement. The terms given as to time for part completion are obviously reasonable,—two years and seven months for a railroad of about sixty-five miles. It is

the law of all executory contracts that, where no time for performance is fixed, the law steps in and fixes a reasonable time. *Boyd* v. *Gunnison*, 14 W. Va. 1. Thus, the time fixed in the order of subscription is lawful and reasonable, and does not vitiate it. The voidness of this limitation is the shibboleth of the railroad's case.

Another point decisive against the company when it pleads the voidness of this limitation is its own act of acceptance, shown by its deposit of certificates of stock with the bank. It asked this deposit of bonds in advance of work. It accepted the court's order with the time limit in it, and is estopped to say this limit is illegal or unreasonable. This order of the court is the contract between company and county, and, if a corporation agree to a contract, it is bound by it as would be an individual,—by its letter, reasonable or not, legal or not, unless *contra bonos mores*. This company was not mentioned in the order submitting the subscription to vote, and therefore all its rights were born of the court's order containing this time limit, and it must take it as it is. It has no right outside of it, as it is the contract. *Satterlee* v. *Strider*, 31 W. Va. 787, (8 S. E. 552). If not satisfactory to the company, why accept the order? "It is clear that a subscription made on special terms must be accepted precisely as offered, or not at all. Any variance from the terms of subscription would, at most, constitute a counter proposition." 1 Mor. Priv. Corp. section 86. In *Town of Danville* v. *Montpelier & St. J. R. Co.*, 43 Vt. 144, commissioners for subscription inserted conditions not warranted, and it was held that the company could only accept or reject it as it was. See *Brocaw* v. *Board*, 73 Ind. 543. "The plaintiff has the same liberty to accept as the defendant to propose terms. If they accepted them, they must be governed by them as they were made. We cannot change them or substitute others. The authorities requiring strict performance are numerous and pointed." *Railroad Co.* v. *Brewer*, 67 Me. 294.

I have above discussed the question of reasonable time so far as it enters into the question whether the time limit in the order of the county court makes that limit utterly void. I now refer to the matter of time in another aspect,—that

is, (1) whether time is the essence of this contract; and (2) whether, though it were not, still whether the period of fourteen years' failure to perform the work does not authorize the county on general equity principles, to have an end of the matter.

1. Time is the essence of the contract. If the county had given a few months, or a year, we might say it was not so intended; but, giving nearly three years, we may more readily say that both sides so regarded it. Look at the strong language,—an express proviso that if the road should not be ready for ties by 1st of January, 1887, the subscription should be forfeited. Time is often nonessential, where no one suffers by delay, as in many purchases of land; but the very nature of this case forces the conclusion that time was all-important to the county, as we cannot suppose that it intended to handcuff itself for an indefinite term against efforts to get elsewhere the benefit it had in view, should this company fail to perform the work. *Ballard* v. *Ballard*, 25 W. Va. 470. "Where the condition requires the railroad to be begun or finished before a certain date, it is held that time is of the essence of the contract, and the subscriber may be discharged from liability by a failure to comply with the condition." 1 Elliott, R. R. §§ 116, 117. Where a town agreed to issue its bonds on "performance of certain conditions by a railroad company,— as that it should construct its road from a certain point to a certain point within a certain time,—if the company does not perform the condition within the time it cannot, though prevented by floods, compel the issue of the bonds, though it afterwards completes the line. 1 Wood, R. R. § 119, citing *Railway Co.* v. *Thompson* 24 Kan. 170. Subscription, "provided the town of F. is made a point, and said road is put under contract in one year from 1st September, 1853." *Held*, putting the road under contract was a condition precedent to right of company to recover, though the road was finished and running by September 1, 1858; Judge Dillon saying the letting to contract as stipulated might have hastened completion. *Railroad Co.* v. *Boestler*, 15 Iowa, 555. Same doctrine in *Ogden* v. *Kirby*, 79 Ill. 555; *Railroad Co.* v. *Bensley*, 2 C. C. A. 480, 51 Fed. 738; *Dermott* v. *Jones*, 23 How. 231,

16 L. Ed. 442; 1 Pom. Eq. Jur. § 455. Where condition of completion is imposed, it is strictly enforced. *De Voss* v. *City of Richmond*, 98 Am. Dec. 675; 15 Am. & Eng. Enc. Law, 1284; 2 Elliott, R. R. § 117.

2. Suppose time were not of the essence of the contract. Then there has been such long delay by the party undertaking to perform the work that it cannot, as plaintiff, ask equity to give relief, because the rule is that when a party has been grossly negligent in performance of his contract he cannot ask aid of equity; and more, especially is this the case when he asks relief where time is of the essence, and more still where he asks relief against express provision of forfeiture. He must show, even in cases of a nature proper for relief, that he has not been negligent or careless, or that delay was caused by the other party. *Brashier* v. *Gratz*, 6 Wheat. 528, 5 L. Ed. 322. A party asking relief must show that he has been "ready, desirous, prompt, and eager," or where he has been as prompt as the nature of the case admits. Fry, Spec. Perf. § 22. Even equity will not relieve a party who has been in default in performing a covenant. JUDGE HOLT, in *Hukill* v. *Guffey*, 37 W. Va. 464 (16 S. E. 544), citing 2 Story, Eq. Jur. § 1321, and 1 Pom. Eq. Jur. § 452. The great volume of law on the subject of in what cases equity will give relief seems summed up in a few words in 2 Story, Eq. Jur. § 1314, as follows: "In every such case the true test (generally if not universally) by which to ascertain whether relief can or cannot be had in equity is to consider whether compensation can be made or not. If it cannot, then courts of equity will not interfere. If it can be made, and the penalty is to secure the mere payment of money, courts of equity will relieve the party on payment of principal and interest." Therefore the case falls, not under the doctrine of equity that, where the only purpose of the clause is to compel payment of money, relief will be given, but under that principle of equity that where the object is not to secure merely money, but to enforce a collateral act, as building or repairing, there equity does not give relief. *Id.* §§ 1323, 1324. There is a difference between penalties and forfeitures in equity. In the former relief is always given, if compensation can be made,

as the penalty is a mere security. In the latter, even if compensation could be made, it is not always given. *Id.* § 1320. Why talk about compensation in this case?

How can it be said that a period of over fourteen years of failure to do the work, making scarcely a commencement, ought not to debar the company from asking a court of equity to compel Harrison County to keep open its offer, even if time were not of the essence of the contract —First, from the very nature of the work; second, from the forfeiture clause in the contract? Perhaps time had changed things. How many of those voting for that subscription, parties to it, who expected to reap the benefit from the railroad proposed, had gone to their graves? We may, from judicial cognizance, say that another railroad, now nearly completed, renders that subscription inadvisable; and it was about to be begun when the county court was about to move to revoke this subscription, as it had a right to do after so long delay and change of conditions. And in this place it is appropriate to bring in another principle of equity jurisprudence, and that is that he who asks relief of it must at least show, if the court could excuse a forfeiture or negligence, that it would answer some purpose to do so, founded on the ability of the party to at last perform his contract. What assurance does the company give to Harrison County that it can build the railroad? None. The long delay disproves it. The bill simply says that owing to the financial depression for the last several years the company had been greatly hindered; but that now, "in a more prosperous financial condition of the country and the general business thereof," the company "is hopeful of procuring the necessary means to prosecute the work." A mere hope! It had failed, not only for the few years of depression, but through many years of growth and prosperity of the country. The officers of the road say in evidence that they cannot say when the road will be completed, and can give no assurance as to its success. They prove its treasury without any means at all. It has no contract for the building of the road.

The argument is presented that, if the bonds are allowed to rest, no harm can come to the county. Shall this heavy liability continue to hang over its people? Does it

not affect their deepest interest? Is it to hang a nightmare and incubus over them longer than fifteen years simply for the benefit of a railroad enterprise whose chance of success seems desperate? We can see why the county is entitled to have a definite settlement of this complication, plainly prejudicial to its important interests.

It is argued that as O. A. Tintsman took stock in the road, perhaps on the faith of the county subscription, his rights are to be regarded. He is not a party to this suit. He was bound to know of that time limit and forfeiture clause, and that the law would operate under them to end the county's liability in case of failure to complete the road. He is vice president. He bought stock in 1893, after nine years' failure to finish the road. He was on its line, and otherwise knew of such failure. But this is immaterial to the case. Is it possible to say that the clear right of one stockholder to be free from his subscription under the facts pertaining to it shall be defeated because another took stock, even on the faith of it?

It is useless to say much as to the refusal of the county court in 1888 to revoke the subscription. It was a mere act of indulgence and grace. It did not waive the public right. The fact that it did not choose in 1888 to enforce its rights does not debar it from so doing in 1898. The county court did not make any agreement not to revoke. How could it do so? How could it give away the public right under that forfeiture clause? What statute authorized it to do so?

To me, this is a very plain case in favor of Harrison County. I have written too much upon it, but have done so only in deference to the amount involved, the importance of the case, and chiefly in deference to the number, distinction, and ability of the counsel and their briefs. I have refrained from intimating any opinion upon the question of whether the charter existence of the railroad company has become extinct from nonuser or other cause. Counsel have ably argued it,—those for Harrison County contending that its corporate life has ended, and for that reason it has no right in the matter; but, as it is not necessary, I have avoided the discussion of that question. I have no opinion as to it. It cannot be necessary to prolong this

opinion to show that the county was not required to bring a suit to enable it to cancel the bonds. The terms of the deposit gave that authority, as I have shown above from 11 Am. & Eng. Enc. Law, 352. And the company has itself brought the matter into court, thus giving judicial determination.

Decree Affirmed.

(NOTE BY BRANNON, JUDGE:)

I meet with some cases since the foregoing opinion was filed which I think sustain it. In *Falconer* v. *Railroad Co.*, 69 N. Y. 491, where a condition was imposed by taxpayers in a railroad subscription that the road shall "be constructed before said bonds shall be delivered to said company or sold," and the commissioners appointed to carry out the subscription made an agreement with the company that when it complied with the condition they would make the subscription and deliver the bonds and then an amendment of the Constitution was adopted prohibiting towns from subscribing to railroads, and it was claimed that this agreement saved the subscription from death, it was held: That the "commissioners appointed to subscribe and issue bonds were subjected to the condition. They could neither issue bonds, nor subscribe for or take stock, or by any agreement bind the town, until the condition was complied with fully. They could not substitute an agreement by the company to comply with the condition, or any other agreement on its part, for actual compliance, and until such compliance they had no authority whatever to act in the matter." The court said that the agreement did not enlarge or change the right of the company, and the subscription, not being complete before the amendment, perished by reason of it. As to the force of time conditions of subscription, the position taken in the above opinion is strongly sustained by *German Nat. Bank* v. *Franklin Co.*, 128 U. S. 526, 9 Sup. Ct. 159, 32 L. Ed. 519, and *Young* v. *Clarendon Tp.*, 132 U. S. 340, 10 Sup. Ct. 107, 33 L. Ed. 356.

CHARLESTON.

KENEWEG CO. *et al. v.* SCHILANSKY *et al.*

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Submitted Sept. 9, 1899—Decided Dec. 2 1899.

1. EQUITY JURISDICTION—*Fraudulent Transfer.*
A court of equity, ancillary to its jurisdiction to set aside a fraudulent transfer of property, may take the necessary steps to preserve the property involved during the pendency of the litigation. (p. 288).

2. FRAUD—*Notice—Purchaser.*
If the circumstances involved in the making a fraudulent transfer of property are sufficient to put a man of ordinary prudence and experience in business transactions on inquiry, he must be held, though a purchaser for value, to have notice of the fraudulent intent of his vendor to delay, hinder, and defraud his creditors. (p. 289).

3. FACTS—*Commissioner's Finding.*
The finding of a commissioner as to facts confirmed by the circuit court will not be disturbed unless plainly erroneous. (p. 294).

4. FACTS—*Commissioner's Finding.*
On the other hand, if such finding is not justified by the evidence, it will be set aside, and the decree founded thereon will be reversed. (p. 290).

5. DECREE—*Pleadings— Proof.*
A decree is the conclusion of the law from the pleadings and proofs, and where there is a failure either in the allegations or proofs there can be no decree. (p. 291).

Appeal from Circuit Court, Tucker County.

Five suits by the Keneweg Company and others against Schilansky & Schatz and others. Judgments for plaintiffs, and M. Schidlovsky and others appeal.

Modified.

A. G. DAYTON, F. O. BLUE, C. O. STRIEBY, and C. WOOD DAILEY, for appellants.

CUNNINGHAM & STALLINGS, E. D. TALBOTT, and A. J. VALENTINE, for appellees.

DENT, PRESIDENT:

M. Schidlovsky and others appeal from a decree rendered in favor of the Kenneweg Company and others against Schilansky & Schatz *et al.* on the 18th day of June, 1898, by the circuit court of Tucker County, in five certain suits therein pending to set aside certain fraudulent transfers and conveyances of property by said Schilansky & Schatz, and subject it to the payment of their debs. Numerous errors are assigned, some of which are purely technical, and some reach the merits. Attachments were sued out and levied on three certain stocks of goods sold the same day by said firm to M. Schidlovsky, D. Levy, and Frank Schulberg, respectively. The goods, because of their perishable character, were sold under an order of the court. The attachments were then quashed for insufficiency of the affidavits, and the proceeds of the sale were ordered paid to said purchasers. Before this was done the plaintiffs filed an amended bill, and the court restrained the payment of these funds as formerly directed until further order. The funds so held were on a final hearing directed to be paid to the creditors attacking the sales as fraudulent. The attachments were quashed and the restraining order was issued during the same term, while the matter was still in the breast of the court. Hence the former order, which was in effect set aside and suspended by the latter, cannot be held to be *res judicata* as to the latter. No such plea was made, although it appears to be seriously insisted upon in argument. *Res judicata* must be pleaded in equity. The bills are in no sense multifarious, as they have but one object, and that is to subject the property of Schilansky & Schatz to the payment of their debts. Mary Geisberger having filed her affidavit and petition to that end, the appeal must be dismissed as to her. A commissioner has the right to give his reasons for his holdings, without being subjected to the criticism of arguing the case. So far as the conveyances to Schidlovsky, Levy, and Schulberg are concerned, the facts and circumstances cannot possibly be held to preponderate against the holding of the court. Even though they paid full value for the goods, it is plainly evident they were endeavoring to aid the firm of Schilansky & Schatz to perpetrate a fraud upon their

creditors; otherwise, they would have made some effort to have the purchase money applied upon their debts, and not have aided them to place the same beyond the reach of creditors. There was enough at least in the manner and mode of those sales to have raised an honest dealer's suspicion, and put him on inquiry which was sufficient. They operated to delay, hinder, and defraud creditors. *Frank* v. *Zeigler*, (W. Va.) (33 S. E. 761;) *Dent* v. *Pickens*, *Id.* 303; *Farley* v. *Bateman*, 40 W. Va. 540, (22 S. E. 72).

The real questions of merit which require consideration are those raised by exceptions to the commissioner's report, as follows, to wit: M. Schidlovsky excepts because the commissioner holds that the deed of trust securing his debt was made at a time when Schilansky & Schatz were insolvent. William Rosendorf excepts for the same reason as to one of his debts. The deed of trust securing the latter was dated the 22d day of June, 1895, and recorded the 1st day of July, 1895. The deed of trust securing the former was dated the 1st day of July, 1895, and recorded the 6th day of July, 1895. On the 5th day of July, 1895, the three stores were sold by said firm, which undoubtedly rendered them insolvent, as their real estate was already subject to other liens. If not insolvent, they should have preferred all their creditors, and not a select few. A man who is solvent can pay his creditors, and need not prefer any. The conduct of Schilansky & Schatz the latter part of June and the first of July, when they began to fix their property and prefer their favorites, is proof positive that they were in failing circumstances, and were scuttling an already sinking ship, at the same time they were transferring the cargo in order to make friends with the mammon of unrighteousness. The man who cannot pay his debts is insolvent. *Weigand* v. *Supply Co.*, 44 W. Va. 133, (28 S. E. 803); *Wolf* v. *McGugin*, 37 W. Va. 552, (16 S. E. 797). The commissioner finds that the insolvency of Schilansky & Schatz as a firm and individually occurred the latter part of June, 1895, as a result of the numerous sales and conveyances of their property about that time consummated. This Court is unable to say from the pleadings and proofs that such finding is wrong. *Stewart* v. *Stewart*, 40 W Va. 65, (20 S. E. 862); *Chapman*

v. *Railroad Co.*, 18 W. Va. 185. William Rosendorf also excepts to the commissioner's report for the reason that his two thousand dollar debt is postponed to fourth in priority on lot No. 15 in Davis, West Virginia, instead of second. His deed of trust was held to be fraudulent by the decree of the court entered the 11th of December, 1897. This deed was executed the 5th day of February, 1895, and admitted to record the 11th of February, 1895. The commissioner reports that four months at least after this time Schilansky & Schatz were solvent. There is no evidence showing, or even tending to show that at the time of the execution of this deed Schlansky or Schatz, or either of them, had any intent whatever to defraud their creditors. And, while the court finds fraudulent intent to exist as to this deed, it is not able to do so as to the two deeds executed four months later. The deed of the 5th of February has not been shown to be fraudulent in its inception, and there is no sufficient evidence to show that it has been paid off or satisfied. The charge of fraud as to it is wholly unsustained. The charge of fraud as to the trust lien of the Southern Building & Loan Association on the same lot, to wit, No. 15, was abandoned. Hence the court was not justified in postponing the trust debt of William Rosendorf to the debts of the Keneweg Company and the Baer Sons Grocery Company, but said debt of William Rosendorf should have been decreed second in priority on this lot No. 15. The after admissions or declarations of Schilansky & Schatz in their pleadings or otherwise cannot affect prior innocent purchasers. If such was the case, no man's title would be safe.

Daniel Rosendorf excepts to the commissioner's report because he holds that the thirty shares of stock of Schilansky & Schatz are liable to the payment of the debts of the creditors assaulting them. He insists that there is neither allegation nor evidence of assault on these thirty shares of stock. The bills of both the Keneweg Company and the Baer Sons Grocery Company have the following prayer, which in effect is common to both, to wit: "That the deed of trust executed on the 6th day of July, 1895, by the Middle Mountain Boom and Lumber Company to C. O. Strieby, trustee, to secure themselves, be declared fraudu-

lent and void, and that the same be set aside as fraudulent, and whatever interest the said Schilansky & Schatz had in said corporation be decreed to plaintiff in the payment of its debt." The deed of trust referred to is one executed by the president and secretary of the company, William Rosendorf and Daniel Rosendorf, for moneys to the amount of ten thousand dollars advanced by themselves on the property of the Middle Mountain Boom and Lumber Company, in which they are themselves the principal stockholders. As to creditors and other stockholders such a deed on its face is void,and does not even amount to an incumbrance on the property of the Middle Mountain Boom and Lumber Company. But what right had the Keneweg Company and the Baer Sons Grocery Company to assail it in this suit? This is not a suit in which to settle the affairs of the Middle Mountain Boom and Lumber Company, but the affairs of Schilansky & Schatz. It turns out that they have thirty shares of stock in such company which are claimed by assignment by Daniel Rosendorf. Such assignment has as yet been assailed by no one, and such shares of stock have never been properly brought before the court. *Shoe Co.* v. *Haught*, 41 W. Va. 275, (23 S. E. 553). They have not been attached, nor is there anything to give the court jurisdiction of them. The only excuse given why the court has any control is the attack on the void deed aforesaid. Such an attack renders the bills to this extent quasi multifarious, for the affairs of this Mountain Boom and Lumber Company cannot be settled in this case; and, although the court sets aside said deed of trust, it does not undertake to make such settlement, but decrees such stock for sale, although not justified in so doing by the allegations. This stock should be dismissed from this case as not assaulted.

Rosendorf & Co. except to the commissioner's report because he finds that Schilansky & Schatz own a one-seventh interest in what are known as the "Harper Lands." Schilansky is forced by the court on application of the commissioner, to produce the following contract in relation to this land: "This memorandum of agreement made and entered into this 10th day of June, 1895, by and between Wm. Rosendorf and Daniel Rosendorf, partners trading un-

der the firm name and style of Rosendorf & Co., of the city of New York, of the first part, and B. Schilansky and G. Schatz, of the town of Thomas, West Virginia, witnesseth, that whereas the parties of the second part became purchasers of a one-seventh interest of the real estate sold to the firm of Rosendorf and Company at a special commissioner's sale on the 12th day of June, 1893, at the front door of the court house of Tucker County, West Virginia, in the chancery cause of E. Harper, Adm'r, against Thaddeus Harper and others, and failing to pay their part and *pro rata* share of the purchase money therefor, but did pay the sum of two thousand one hundred and twelve dollars and twenty cents thereon: Now, therefore, it is expressly agreed and understood that the deed for all the said land shall be made by the commissioners therein to the parties of the first part; that the sum of two thousand one hundred and twelve dollars and twenty cents so paid by the parties of the second part to the commissioner shall be applied by the parties of the first part as a credit on an individual indebtedness for merchandise and borrowed money, &c., of the parties of the second part to the parties of the first part; that the parties of the first part shall pay to the said commissioner the balance due on the purchase money of the said real estate; that the legal title therefor shall remain in the parties of the first part, and they shall hold the same as long as they may elect to hold the same, and cannot be forced to sale or sold by the parties of the second part, or controlled in any way, save and except by the consent of the parties of the first part; that after every tract of the same has been disposed of by the parties of the first part, and the money therefor collected, and after all costs, expenses, damages, losses, interest at the rate of six per cent. be allowed on the money invested by the parties of the first part, all taxes paid, and all expenditures provided, of whatever nature, subject to agreement dated February, 1895, then the parties of the second part shall be entitled to a one-seventh share of the net profits. Witness our hands this day and year aforesaid. Rosendorf & Co. B. Schilansky." George Schatz did not sign this agreement, but on the 22d day of June, 1895, in furtherance thereof, he executed a deed for his interest in said

land to William and Daniel Rosendorf, which deed is attacked as fraudulent. Also, a decree of the circuit court dated the —— day of June, 1895, directing a conveyance of the land to the Rosendorfs, as the real purchasers thereof, is attacked as fraudulent. At the date of the agreement Schilansky & Schatz were solvent, according to the commissioner's report. Such being the case, they had the right to make the arrangement that the Rosendorfs should take the land and apply such moneys as they had paid on their indebtedness to them, without being in fraud of any of their creditors. If they had been insolvent such an arrangement would have been held to be an unlawful preference, and would have inured to the benefit of all their creditors. The reasoning of the commissioner on the subject of this agreement appears to be without force. He claims the fact that they reserved the right to one-seventh of the profits, when the land should be sold after all expenses were paid, showed they still owned the one-seventh of the land. This does not follow, for while Schilansky & Schatz felt compelled to give up their interest, because of inability to pay the purchase money, yet they determined not to lose the benefit of what they considered a good bargain, and therefore they retained a right to their proportionate share of their prospective profits. This does not make this contract either fraudulent, remarkable, or void. And because an ejectment suit was pending in that court, brought in the name of all the original purchasers, as probably shown by the decree of confirmation of the sale prior to the agreement that Schilansky & Schatz were to release their interest, and the deed was to be made to the Rosendorfs alone, is no evidence of fraud. The commissioner's report is apparently without any foundation to sustain it, for, after finding from this contract that Schilansky & Schatz have the equitable title to one-seventh of the Harper lands, he adds, "I further report that Schilansky & Schatz were solvent at the time they conveyed or pretended to convey their interest in the above-mentioned lands to Rosendorfs." If solvent, why is the contract fraudulent? The real reason which seems to govern the commissioner is because "the said Schilansky & Schatz have wholly failed to deny the allegations set forth in the bills of the plain-

tiffs, assaulting the same by proper answers to said bills." This is a mistaken idea of the law. Neither the admissions nor confessions of a grantor can be received against a grantee to disparage the grantee's title. *Harden* v. *Wagner*, 22 W. Va. 356; *Casto & Fry*, 33 W. Va. 449, (10 S. E. 799); *Crothers' Adm'r* v. *Crothers* 40 W. Va. 169, (20 S. E. 927). An insolvent person loses all interest in his former property and creditors. He probably cares not which wins or loses, and sometimes he sympathizes more with the attacking creditor than with his former grantee. The very fact that he does not answer, denying fraudulent charges, tends to show a want of conspiracy or understanding between him and his grantee. If such understanding and conspiracy existed, they would carry it through to the end of the litigation. "The *onus pro bandi* is on him who alleges fraud, and, if the fraud is not strictly and clearly proved as it is alleged, relief cannot be granted although the party against whom relief is sought may not have been perfectly clear in his dealings." *Harden* v. *Wagner*, cited. It requires more than mere suspicion to establish fraud. Much of this case has apparently been decided on suspicion,—justifiable, no doubt, but not amounting to that degree of proof which the law demands.

The decree is reversed and amended in so far as it postpones the trust deed of William Rosendorf to the debts of the Kenewig Company and the Baer Sons Grocery Company on lot No. 15, decreed to be sold, and in so far as it subjects the thirty shares of stock of Schilansky & Schatz in the Middle Mountain Boom and Lumber Company to the payment of the creditors who attacked the deed of trust executed by said company to secure its secretary and treasurer in the sum of ten thousand dollars, and in so far as it holds that Schilansky & Schatz own a one-seventh interest in the Harper lands and decrees the same for sale; and in lieu thereof it is adjudged, ordered, and decreed that the debt of William Rosendorf, amounting on the 18th day of June, 1898, the date of the decree of sale, to the sum of two thousand three hundred and seventy dollars, with interest from the 5th day of March, 1898, is a lien second in priority on lot No. 15, and that the thirty shares of stock of Schilansky & Schatz in the Middle Mountain Boom and

Lumber Company be dismissed from this suit, as no creditor has yet obtained the right in any manner to subject the same to the payment of his debt, and that the one-seventh interest of Schilansky & Schatz in the prospective net profits in the Harper lands be sold subject to the provisions of the written agreement bearing date the 10th day of June, 1895, and in all other respects the decree is affirmed, with costs to the appellants, to be paid out of the personal funds now in the hands of George A. Mayer, deputy for Will E. Cupp, late sheriff of Tucker County, and which fund was directed to be distributed *pro rata* upon the debts of the Keneweg Company, A. F. and J. W. Horner, the Baer Sons Grocery Company, Baker & Ginsburg, and Witz, Bean & Co.; and the cause is remanded to be further proceeded in according to the rules and principles governing courts of equity.

Modified.

CHARLESTON.

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HALL v. VERNON *et al.*

Submitted June 21, 1899—Decided December 2, 1899.

1. PARTITION—*Oil and Gas—Void.*

Partition of oil and gas owned by co-owners separate from the surface cannot be decreed, except by sale and division of the proceeds. A judicial partition thereof by assignment of the oil and gas under sections of the surface is void. (p. 299).

Appeal from Circuit Court, Wirt county.

Bill by George W. Hall against W. V. Vernon and others. Decree for defendants, and plaintiff appeals.

Reversed.

V. B. ARCHER, for appellant.

CASTO & FLEMMING, VAN WINKLE & AMBLER, and JOHN H. RILEY, for appellees.

BRANNON, JUDGE:

Hall brought a suit in equity against Vernon and others in the circuit court of Wirt County, alleging that a tract of one thousand one hundred and three acres of land was, as to the surface, owned by Messrs. Doneho and Vernon, and that they had divided the surface; that the tract contained oil; that Messrs. Doneho, Vernon, and Hall owned the minerals in it, each a third; and that in a suit brought by Hall and Vernon against Doneho and others some years before there had been a decree of partition of the mineral ownership into lots forty rods wide, and running to the exterior of the tract, which decree the bill in this case alleged had been obtained through fraud of Vernon, and it sought to annul the decree. The bill alleged that Vernon under this decree was taking oil from the lots assigned him, and using tanks, machinery, etc., belonging to all three persons, in his operations. The bill asked (and it was granted) an injunction restraining Vernon from operating oil wells on the tract, and from selling oil produced thereon, and restraining the pipe-line companies from paying Vernon for oil, or giving him certificates for oil deposited with them. A decree dissolved the injunction so far as it related to the land or the partition assailed, the court holding that the decree of partition had not been obtained by fraud. Hall appealed.

A majority of the Court are of opinion that the decree of partition is void, and constitutes a cloud over Hall's title, which a court of equity will dispel by setting aside the decree. They take this position on the ground that oil and gas are fugitive, and that co-owners of them, not owning the surface, have a mere right to explore for them, and that it is impossible to partition the same in kind, owing to the nature of oil and gas, and that a court cannot be called on to do an impossible thing, and has no jurisdiction to partition such a right by allotting gas and oil under certain sections of the surface. They hold that partition can be

made only by sale and division of proceeds. Counsel cites the following authorities, for that view; *Gill* v. *Weston*, 110 Pa. St. 312, 1 Atl. 921; Frem. Co-Ten. § 436; 15 Am. Eng. Enc. Law, 607; *Smelting Co.* v. *Rucker*, (C. C.) 28 Fed. 220; *Conant* v. *Smith*, 1 Aiken, 67; Bainb. Mines, 155; *Lenfers* v. *Henke*, 73 Ill. 405; *Kemble* v. *Kemble*, 44 N. J. Eq. 454, 11 Atl. 733.

I am of the opinion that there may be partition of oil and gas owned in fee separate from the surface, by allotting it by sections of the surface. True, one may not get any oil; but the chance is equal for all,—the best that can be done to avoid the sale of the property from its owners, which they have right to develop separately, as they have right to a partition in kind, if possible. Oil in place is realty, and therefore partition may be had of it where the tract is of considerable area. Freem. Co-Ten. §§ 433, 435; *Hughes* v. *Devlin*, 23 Cal. 501; Barringer & A. Mines & M. p. 54; *Marble Co.* v. *Ripley*, 10 Wall. 339, 19 L. Ed. 955. Also, I think that, as equity has jurisdiction in partition, it can determine whether the subject is partible or not, and that, even if the decree be erroneous, it is not void in a legal sense.

The decree dissolving the injunction is reversed, and the cause is remanded, with directions to the circuit court to enter a decree setting aside the decree of partition and perpetuating the injunction, and to proceed further as to matters of personal property before it.

DENT, PRESIDENT, (*concurring*):

The decree of partition in this case did not pretend to divide the solid minerals in the land, as none were shown to exist; and such a partition as was made would be inequitable and unjust if any such solid minerals existed, for it divided the land into twelve narrow strips, and allotted to each of the three owners several of these strips alternately, so that each owner's mineral properties were divided into several distinct strips, separated from each other by the strips belonging to the others. This would destroy the value of the solid minerals, for each party would have to work each tract of his separated minerals separately, instead of having them in one compact body. This decree

is nothing more than a decree to divide the carbon oil, volatile minerals, gas, and gaseous vapors supposed to be or that might exist under the land in controversy by imaginary lines drawn over the surface of the land. Equity is natural justice. It is equality. It never does a vain thing, or enforces a void or impossible contract. Men may divide the moon by imaginary lines, but equity will not enforce their contract. They may divide the water in a well or in a brook, or the game in the forest, or the fishes in the sea, but equity will afford them no such relief. "Oil and natural gas are minerals, in the view of the law; but, because of their peculiar attributes, they, as the subject of property, differ from other minerals. * * * Out of possession there is no property in them. * * * They are not capable of distinct ownership in place, owing to their liability to escape from the place where they may be temporarily confined without necessarily any interference on the part of the owner of the soil, or others claiming through him, under whose land they may be found. Like water, they are not the subject of property, except in actual occupancy, and a grant of them passes nothing for which ejectment will lie. * * Oil and gas cannot, while in the ground, like the solid minerals, be the subject of an estate distinct from that in the soil." Barringer & A. Mines & M. pp. 30, 31. A grant to the oil and gas passes nothing for which ejectment will lie. It is a right, not to the oil in the ground, but to the oil the grantee may find. *Dark* v. *Johnston*, 55 Pa. St. 164. So the reservation of the oil and gas is not of the oil and gas in the ground, but of the oil and gas the grantor or his assigns may find and reduce to possession, with the exclusive right to search therefor. Natural gas is incapable of being absolute property, and is the subject of qualified property only. *Wood Co. Petroleum Co.* v. *West Virginia Transp. Co.*, 28 W. Va. 210. "A grant or reservation of oil or gas in certain land passes an incorporeal right only. This arises, as has been above explained, from the nature of oil and gas, which is such that a corporeal interest in them in place cannot be created." Barringer & A. Mines & M. p. 78. "There can be no property in rock or mineral oil, nor can title thereto be devested or acquired, until it has been taken from the

earth.' *Shepherd* v. *Oil Co.*, 38 Hun. 37. Oil and gas grants and reservations are incorporeal hereditaments, which are entire and indivisible at law, though they may be made divisible by the terms of the grant. *Funk* v. *Haldeman*, 53 Pa. St. 229. From these authorities it is plain that a reservation or grant of oil and gas privileges is a mere incorporeal hereditament, which is indivisible, because a division of the right would create new rights, to the prejudice of the owner of the soil, and because, so long, as the oil and gas remain in place, they are incapable of allotment according to quantity and quality. *Smith* v. *Cooley*, 65 Cal. 46, 2 Pac. 880. In the case of *Kemble* v. *Kemble*, 44 N. J. Eq. 454, 11 Atl. 733, it was held that "a partition of lands containing mineral deposits cannot be ordered if the location, extent, and value of such deposits cannot be ascertained." *Franklinite Co.* v. *Condit*, 19 N. J. Eq. 394; *Grubb* v. *Bayard*, 2 Wall. Jr. 81, Fed. Cas. No. 5,849. If such is the case with solid minerals, how absurd it is to even talk of partitioning in kind oil or gas of whose existence, quantity, and location the court is in entire ignorance! And, if three owners of such a right can have partition in kind, they can transfer their interests to others, without regard to numbers, until they would be of such multitude that an attempted partition in kind would entirely destroy the use of the surface to the owner of the land, and yet there exist neither oil nor gas to be partitioned. Such a partition as was attempted to be made in this case was a mere nullity, as it partitioned nothing; and yet it operates as a cloud on plaintiff's rights, in fraud of which it was procured by the defendant Vernon. It being so plainly in excess of the powers of a court of equity, it was proper to set it aside on motion, petition, or in any other way its illegality could be presented to the court from which it was procured, without the necessity of resort to an appeal. It was not only voidable, but void, because it undertook to accomplish the impossible. Equity never undertakes to divide the unseen or invisible, but only that which it can see and measure so as to produce equality. Air, gas, water, and oil are not susceptible of partition in kind, independent of land, either when hidden beneath the surface or floating above it, but only when

reduced to actual possession and control. Neither are the rights and privileges to acquire possession of these fugitive substances susceptible of partition in kind, but they may be sold, and the proceeds thereof divided. The land under which the oil and gas is supposed to exist may be partitioned in such manner among the co-owners of the surface as to effect a division of the gas and oil privileges but not in the manner attempted in the present decree. *Franklinite Co.* v. *Condit*, 19 N. J. Eq. 394.

None of the authorities referred to in JUDGE BRANNON'S dissenting opinion in this case support the position that the attempted partition is justifiable. On the contrary, they are directly to the reverse. Nor have I been able to find any that do, after the most diligent search. In Freem. Co-Ten. § 435, it is said: "But where the interest sought to be partitioned is not a distinct right of property in the mines, but a mere license to mine in the lands of another, it is indivisible, because a division of the right would create new rights, and would prejudice the owners of the soil, and because, so long as the minerals and ores which are the subject of the servitude are in place, unwashed and unsevered from the soil, they are incapable of allotment according to quantity and quality, relatively considered." References by the author; *Hughes* v. *Devlin*, 23 Cal. 505; *Leufers* v. *Henke*, 73 Ill. 405. In Barringer & A. Mines & M. p. 54, it is said that "mining rights are indivisible (that is, nonpartible in kind), but they may be assigned as a whole." The author refers to *Marble Co.* v. *Ripley*, 10 Wall. 339, 19 L. Ed. 955, to sustain this position. Where land is leased with the exclusive privilege of boring for oil and gas, the lessee takes a corporeal interest in the land, and a different rule prevails from that where there is a sale of the surface, and a reservation of the oil and gas. The latter is, as heretofore shown, an incorporeal interest, and amounts to the mere grant of a right or privilege nonpartible in kind. Plaintiff is a joint owner of the oil and gas, but has no interest in the surface, except with his co-owners, likewise co-tenants in the surface. He has the indivisible right with them to bore wells for the extraction of oil and gas, but has no separate right to enter on the lands at any place to bore for oil or gas. So that, when

the court by its anomalous partition undertook to divide the oil and gas by imaginary lines over the surface, it could not confer on planitiff the right to enter on the divisions assigned to him, for this right he did not possess, nor was he entitled thereto; and any of the co-tenants of the surface have the legal right to prevent him from so doing. *Williamson* v. *Jones*, 43 W. Va. 562, (27 S. E. 411). Hence the effect of the court's decree if permitted to be of any force, was to take away and destroy plaintiff's reserved rights to the oil and gas. Thence its nullity; for if plaintiff had no separate right to bore for oil and gas, he had the right to demand his share of the oil and gas brought to the surface by his co-owners, notwithstanding the decree. The decree, therefore, was nothing more than an absolutely void cloud, that hindered him from the enjoyment of his interest in the oil and gas produced by his co-owners in the exercise of their indivisible right to produce the same. For this he could not sue in ejectment, and his only adequate remedy was by an appeal to a court of equity, which could nullify the void decree, and at the same time restore to him his dispossessed rights. While it is true that a court of equity has jurisdiction to determine what property is partible, it has no jurisdiction to partition property which is nondivisable, and thus entirely destroy it; for in attempting to do so it exceeds its jurisdiction, and renders its decree void. It ceases to be a court of equity, and becomes a court of inequity, inequality, and injustice. It assumes a jurisdiction over property not given to it either by common statute or constitutional law, in violation of the natural and reserved rights of the individual, and its decrees are nullities, and binding on no person. "If a court grants relief which under no circumstances it has any authority to grant, its judgment is to that extent void." 1 Freem. Judgm. § 120c. Under no circumstances had the court the authority to grant this decree attempting to partition an indivisable right. *Norfolk & W. R. Co.* v. *Pinnacle Coal Co.*, 44 W. Va. 574, (30 S. E. 196), 41 L. R. A. 414. Although the court have jurisdiction of the subject-matter and the person, yet, if it grants relief which under no circumstances it has the authority to grant, its judgment is void. *Fithian* v. *Monks* 43 Mo. 502. The

decree was both physically and legally impossible. The decree in this case should be reversed, the decree of partition vacated as a nullity, and the cause remanded for further proceedings according to principles governing courts of equity.

Reversed

CHARLESTON.

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SEYMOUR *et al.* v. ALKIRE *et al.*

Submitted September 7,1899—Decided December 9,1899.

1. DECREE—*Infant—Time.*
An infant has six months after majority to show error in a decree. (p. 305).

2. DECREE—*Mistake—Laches.*
One who would set aside a decree by reason of mistake must proceed within a reasonable time after knowledge of it, else he will be barred of relief, by laches. (p. 307).

3. PRESUMPTION—*Payment—Limitation.*
The law raises a presumption of payment, where the statute of limitations does not apply, after lapse of twenty years, which will be conclusive unless rebutted by distinct proof. (p. 310).

4. LIEN—*Mistake - Fraud—Equity.*
A lien discharged or released through fraud or mistake will be restored in equity unless innocent third parties are affected. (p. 307).

Appeal from Circuit Court, Mineral County.

Bill by Susan B. Seymour and others against Nimrod Alkire and others. Decree for plaintiffs, and defendants appeal.

Reversed.

F. M. REYNOLDS. for appellants.

ALBERT A. DOUB and TAYLOR MORRISON, for appellees.

BRANNON, JUDGE:

In December, 1853, Brady brought a chancery suit in the circuit court of Hampshire County, subsequently transferred to the circuit court of Mineral County, against the estate of Wheeler, the object of which was to assert a debt in favor of Brady, and sell the lands of the deceased for payment of the debt of Brady, and those of others. A decree was made subjecting several tracts of land to sale, and appointing White and McDonald special commissioners to sell. In March, 1856, a sale was made of a tract of land by said commissioners to Alkire, which was confirmed by decree 17th of September, 1856. The terms of sale by the decree were part cash, part in thirty days, and the balance in three annual installments. The report of this sale stated the price as six thousand, seven hundred and fifty-five dollars, but the cash and bonds for unpaid purchase money made up only five thousand, seven hundred and fifty-five dollars, a discrepancy of one thousand dollars. It is claimed in this case that three of the bonds were taken for one thousand, three hundred and fifty-five dollars and forty-one cents each, instead of one thousand, six hundred and eighty-eight dollars and seventy-five cents. By decree of 17th of September, 1857, leave was given to Alkire to pay all the purchase money before maturity, and it directed the commissioners, on such payment, to convey the land to Alkire, and he paid off the bonds; and the commissioners conveyed the land to him by deed dated the 27th of April, 1858, stating the price as six thousand, seven hundred and fifty-five dollars. In October, 1869, an order was made referring the case to a commissioner to report what debts of Wheeler remained unpaid, what funds were in the special commissioners' hands, what had been loaned out, and to whom; but the reference did not refer the matter of the said mistake. The commissioner filed a report in 1872, in which he reported it as a mistake. No action was taken on this report. In October, 1879, a rule was awarded against Alkire to show cause why he should not pay the one thousand

dollars aforesaid, and reference was made to a commissioner to resettle the accounts of White and McDonald, Commissioners, providing for notice to Alkire, as purchaser, and as a person entitled to some of the moneys arising from the sale; but it in no manner—not even by a general clause to report any pertinent matter —required any examination as to the alleged mistake of one thousand dollars. Depositions were taken under this reference, but not till July, 1885. The commissioner reported in August, 1885, the same as former report. No action was taken on these reports till the decree of 11th July, 1898, appealed from in this case. In May, 1886, Susan B. Seymour, a daughter of Wheeler, and one of his heirs, entitled to the proceeds of sale after debts, asked leave to file a bill of review to rehear and correct the decrees of 17th of September, 1856, and 17th of September, 1857, assigning as error the said matter of one thousand dollars; but the court refused to allow it to be filed, 6th of May, 1886. In March, 1887, Mrs. Seymour presented a pleading called an "amended and supplemental bill," and was allowed to file it, and she was allowed to become plaintiff in the case; having been a defendant as a child of her deceased father, Wheeler. This bill alleged the error or mistake aforesaid, and prayed that Alkire be required to pay the one thousand dollars, and for general relief. The case was heard in July, 1898, and a personal decree rendered in favor of Mrs. Sevmour against Alkire for three hundred and thirty-three dollars and thirty-three cents, with interest from the 7th of March, 1856. From this decree, Alkire appeals.

There is at once apparent an error for which the decree must be reversed, and that lies in the fact that it is a purely personal decree against Alkire. Even though there is a lien on the land for the demand, as a personal liability it would be barred in five years, as Alkire gave no note; for the mere personal debt may be barred, and other property of the debtor not liable, though the specific property is still good from the lien upon it. *Criss* v. *Criss*, 28 W. Va. 388; *Evans* v. *Johnson*, 39 W. Va. 299 (19 S. E. 623), 23 L. R. A. 737. But we must pass on the merits of the case in other respects.

The decree confirming the sale was surely a final decree,

discharging Alkire from any further participation in the case as purchaser. *McKinney* v. *Kirk*, 9 W. Va. 26. The decree confirmed the sale when there was a discrepancy between the amount of the purchase price as given in the report of the sale, and the amount shown in the same report by cash payment and bonds for the deferred payments; and later decrees directed a deed to the purchaser on payment of the bonds, thus aggrieving Susan Wheeler by passing title to the land, and discharging the lien without payment of all the purchase money. She had a remedy. Being then, likely, an infant, she could have sued out a writ of error, or used a bill of review or original bill while an infant, by a next friend, or within six months after full age. *Lafferty* v. *Lafferty*, 42 W. Va. 783 (26 S. E. 262); *Harrison* v. *Wallton's* Ex'r, (30 S. E. 372), 95 Va. 721, 41 L. R. A. 703. When she became of age, the record does not show. She was an infant December 5, 1853. She was adult before December 5, 1874. She took no steps to correct this error until May, 1886, when she presented a petition assigning this error in the decrees of 17th Septeber, 1856, and 17th of September, 1857, and asking the correction of the decrees, and that Alkire be required to pay the one thousand dollars. This was a bill of review or petition for rehearing,—call it which you will. The court refused to allow it to be filed, and if there was error in the decrees, it was error to refuse that bill of review, and should have been corrected by appeal. I think it was error to confirm the sale, and direct transfer of title, and discharge lien before the amount of purchase money shown by the record was paid; and this being so, it was to be corrected by appeal or bill of review, or some other process to show cause against it by an infant. We have to take one view or the other,—either that the purchase money was six thousand, seven hundred and fifty-five dollars, and thus show error in receiving less and passing title, or that that sum was not the sum, but that the cash and bonds showed the true sum, five thousand, seven hundred and fifty-five. In the latter case there is no wrong. It is on the former that relief is asked. Then it was error correctible otherwise. The right by any mode to show error in those decrees was gone when the bill of

review was presented. The rule against Alkire to show cause why he should not pay this one thousand dollars as balance of purchase money would not lie in the case, because he had paid every cent required by the decree, and he had received his deed, many years before. Alkire had been discharged from the case. The rule takes the record as it is. Error of law could not be reversed by it. As, then, any error predicated on the record, which is the most that can be claimed to sustain the rule, was beyond recall, this mere rule could not be used, as plainly shown by the opinion in *Glenn* v. *Blackford*, 23 W. Va. 182. A rule is proper where no new facts outside the record are to be litigated,—where the title has not passed. Here the record, including the deed, showed payment. The case required something to obviate that deed. No note or anything showed that Alkire had not complied with the requirement of the decree. It required a bill to allege mistake or other fact not shown by record, if not error of record, and giving the party a chance to repel the basis on which relief was asked. A rule does not do this. A rule could not be used to reverse the decree and nullify the deed.

But while I think that the decrees and refusal of the bill of review are conclusive against relief by original bill, which cannot correct error in law, and thus the case ends here, still let us look at the bill called an "amended and supplemental bill." It cannot be treated as in the old case. That was ended. The bill was not germane to its cause of action. We must therefore regard this as an original bill, on new matter, to correct a former decree, and compel payment of the one thousand dollars, on the ground of mistake. If the object be to subject Alkire to a personal demand,—and such is the only object of the bill, judged by its specific prayer,—it is barred, again and again. The statute begins from the date of the mistake(1856), not from its discovery, in the absence of fraud. *Shriver* v. *Garrison*, 30 W. Va. 456 (4 S. E. 660); Wood, Lim. Act. § 119, note; *Bickle* v. *Chrisman*, 76 Va. 678; 13 Am. & Eng. Enc. Law, 730. Alkire had no contract with Mrs. Seymour,—only with the court,—and action for money payable to a receiver is barred like any other case. The sta-

tute does not except it. *Laidley* v. *Smith*, 32 W. Va. 387 (9 S. E. 209). But it is claimed there was a lien on the land, and it was discharged by the alleged mistake, and should be restored. A mortgage or other lien thus discharged will be restored in equity where no third party's right intervenes. 1 Jones, Mortg. § 966. But Mrs. Seymour knew of this mistake as early as 1872. It was shown by record from 1856, open to every one. One with means of knowledge cannot plead ignorance of mistake or fraud to excuse laches. *In re Broderick's Will*, 21 Wall. 519, 22 L. Ed. 599, cited; *Lafferty* v. *Lafferty*, 42 W. Va. 792 (26 S. E. 262). The bill asks no such specific relief as the assertion of a lien on land, but there is a prayer for general relief; and if the mistake were established, and relief not lost by time, such relief might be had under it, the facts stated warranting it. First, under this head, we must see whether the mistake exists. To show a mistake in a settlement or instrument, evidence must be clear, convincing, beyond reasonable controversy. *Robinson* v. *Braiden*, 44 W. Va. 183, (28 S. E. 798). The burden is on him charging mistake, not on the other party to disprove. The particular facts must be clearly shown (*Calwell* v. *Caperton's Adm'r*. 27 W. Va. 397; *Jarrell* v. *Jarrell*, *Id.* 743; 15 Am. & Eng. Enc. Law, 65); especially where the mistake is in solemn judicial proceedings, and especially, also, where a long time elapsed after the mistake till its investigation, as here (*Weidebusch* v. *Hartenstein*, 12 W. Va. 760). Time obscures the memory, though witnesses of the transaction yet live. In a report of a commissioner returned in 1872, this mistake is stated. It was not included in the matters referred to him. The evidence on which he made the suggestion does not appear. Under an order, 24th May, 1879, a commissioner was directed to report on specific matters, not including this, even under a general requirement to report matters pertinent. Nothing was done under this till 23d July, 1885, and at that date depositions were taken, including that of Special Commissioner White. He, of all others, would know most of it, having made the sale. He forms an opinion (quite plausible) that the mistake was made in taking notes for too little, by one thousand dollars, but he forms or deduces it from

some old papers. He does not state it as fact from recollection, and declines to do so. He said: "The transactions were many years ago, and the war intervening, and many events in my life happened. Of course, I have no recollection of the facts themselves." But he was, in opinion, satisfied of it from the papers, argumentatively. He in several places pleads his inability to remember things concerning the money matters in the case, though he had charge of those matters. When asked the important question whether he could state from recollection the price at which Alkire purchased, he answered: "I cannot state any more than the papers show. I believe the mistake occurred in the manner I've stated,—not bearing in my memory the actual amount the tract sold for. I can't state that Mr. McDonald, in writing the reports (of sale), didn't make a mistake in writing the price; and they were signed in a hurry, and afterwards taken for granted to be correct. Such a thing might have been." Three notes were found by witness in Alkire's possession years after the sale,—three only; but the War raged with fierceness in Hampshire, and Alkire swears that his papers were lost. He says no such mistake was made, and he had paid every cent due from him. A witness (Armstrong) who had some connection with paying money to the commissioners for Alkire is dead. The evidence of Commissioner White is the strongest showing in the case, and he is careful to say it is mere opinion,—inference from what papers he had, not actual recollection. Some of his papers were lost. Twenty-nine years from the mistake to the taking of this testimony, and the Civil War and its sorrows and distractions intervening, can a court, after so long a time, on such vague, inconclusive, contradictory testimony, put on Alkire this burden? Can we take the step safely? Very strange this mistake was not discovered for so many years,—for ten or fifteen years. Those depositions are, however, not competent evidence. They were taken, more than two years before the supplemental bill was filed, before a commissioner executing an order of reference about other matters, which did not touch this subject, either specifically or under a general clause. They were objected to. In addition, the record is not sure evidence. The strong-

est item shown by it is that the cash is just five per cent. of six thousand, seven hundred and fifty-five dollars, as required by the decree of sale; and yet this is not infallible, as a wrong figure, among other sales and calculations, might have got into the head of the commissioner. The report states the price at six thousand, seven hundred and fifty-five dollars, but the notes and cash give a different version. Which version shall we take? But say that the mistake was made. Then time and laches forbid relief. The mistake was in 1856, and it was decreed upon in 1898. Some twenty-three years passed before that rule, if it could be considered as an effort to correct the mistake,—thirty-one years till this bill was filed. A part of this time Mrs. Seymour was an infant. When she became of age, she does not say or show. If she wants the benefit of infancy, she must show its term. She became of age prior to 1874. She knew of the mistake in 1872, at latest. She allowed thirteen years after that, at least, to pass before she filed her bill. Even where infancy is used to excuse laches, lapse of time subjects the evidence to doubt, and necessitates strict proof and caution. 12 Am. & Eng. Enc. Law, 552. The laches is great and inexcusable, and forbids relief. Even in case of fraud, diligence must be used to repair it. So in case of mistake. *Williams* v. *Maxwell*, 45 W. Va. 297 (31 S. E. 909); *Trader* v. *Jarvis* 23 W. Va. 100. "Where a party desires to rescind on the ground of mistake or fraud, he must, upon discovery of the facts, at once announce his purpose, and adhere to it." *Grymes* v. *Sanders*, 93 U. S. 55, 23 L. Ed. 798; *Whittaker* v. *Improvement Co.*, 34 W. Va. 217, (12 S. E. 507). And here there is another doctrine forbidding relief: If you take the rule into consideration, not a thing was done under it for twenty years. The bill was filed in 1887, and nothing done till 1898. The commissioners' report lay from 1872, unacted on, till 1898. "In a court of eqiuty, it is not only required that claims should be brought forward in a reasonable time, but that they shall be prosecuted with reasonable diligence." Judge Moncure in *Crawford's Ex'r* v. *Patterson*, 11 Grat. 374. But in addition to such laches, there is the presumption of payment after lapse of twenty years. The one thousand dollars would

be due in thirds in 1857, 1858, 1859,—from twenty-eight to thirty years before the bill filed. "The presumption of payment from lapse of time is a presumption of law, and is conclusive unless rebutted by distinct proof." 1 Jones, Mortg. § 915; *Camden* v. *Alkire*, 24 W. Va. 674; *Edwards* v. *Chilton*, 4 W. Va. 352.

It may be that real justice is not done in this case, but the great length of time and laches and staleness of demand deny relief. Time must give rest, repose, and finality to the liabilities and cares of man. The effort is to put on an old man, more than three score and ten, ready for the grave, a large debt, with its accumulation of interest, after a period that has carried off more than a generation, for an alleged mistake more than forty years old. The Code (in chapter 104, sections 4, 17) will not tolerate an action, even in case of infancy and coverture, longer than twenty years, in any event, from accrual of cause of action; showing the policy of having an end of things at some time. Decree reversed, and amended and supplemental bill dismissed

Reversed.

CHARLESTON.

CAMDEN *v.* DEWING *et al.*

Submitted September 8, 1899—Decided Dec. 9, 1899.

1. COMPETITION—*Contract—Consideration.*

Withholding competition, when not contrary to public policy, is a sufficient binding consideration for a contract. (p. 313).

2. EQUITY—*Specific Performance.*

Two men, who are engaged in buying lands in the same sec-

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tion of the country, to avoid competition, and secure the lands at a reduced price, agree that one shall buy for both, and that the lands so purchased shall be divided between them according to certain well-known surveys. One retires from the business, and the other goes on and buys the lands according to the agreement, but takes the deeds in his own name. He afterwards transfers them to a third party, who promises to discharge the agreement to divide, but afterwards refuses to do so. Equity will enforce specific performance. (p. 313).

3. DECREE—*Evidence—Preponderance.*

If the evidence is conflicting and contradictory to such an extent that reasonable men may differ as to the true preponderance thereof, this court will not reverse the finding of the circuit court. To secure such reversal, the evidence, when sifted, must plainly preponderate against the decree. (p. 315).

Appeal from Circuit Court, Berkeley County.

Action by Johnson N. Camden against William S. Dewing and others. Judgment for plaintiff. Defendants appeal.

Affirmed.

W. T. ICE and E. D. TALBOTT, for appellants.

MOLLOHAN & MCCLINTIC, W. G. MATHEWS and FRANK WOODS, for appellees.

DENT, PRESIDENT:

In June, 1890, Johnson N. Camden filed a bill in chancery in the circuit court of Greenbrier County against William S. Dewing, James H. Dewing, and Charles A. Dewing, partners doing business in the firm name of Dewing & Sons, for the purpose of compelling them to execute to him a deed for about fifteen thousand acres of land situated in Greenbrier, Nicholas, and Webster counties. The case is as follows, to wit: In the year 1885 A. H. Winchester was acting as agent of Dewing & Sons in purchasing wild lands in this State. While so engaged he formed a partnership with Elihu Hutton for the purpose of purchasing lands on the waters of Gauley river. This firm carried on operations, beginning with the summer of 1885, continuously for several years. In its operations it learned that the plaintiff held options from many of the land owners, and that he, too, was buying the lands that they were after. They thereupon approached the plaintiff, and proposed to

do away with opposition, by letting one party do all the buying of the lands, and they would be able to secure them at a lower figure than otherwise. The plaintiff informed them that he was anxious to complete his purchases of what were known as the "Caperton Lands," as he already held part of them, and agreed that, if they would purchase such lands for him, he would surrender all options outside thereof, and permit them to be the only buyers in the field. This they agreed to do. He carried out his part of the contract by surrendering his options and withdrawing as a purchaser. They went ahead in accordance with this understanding, and secured the title to about fifty thousand acres of land. Bernard J. Butcher was also taken into the partnership, but afterwards parted with his interest to his co-partners. The funds used in paying for this land were derived directly or indirectly through the purchases of other land from Dewing & Sons. After the purchases had all been effected, Winchester induced Dewing & Sons to purchase the same at the rate of two dollars per acre; they assuming his share and obligations and buying out Hutton. All the lands were then deeded to Dewing & Sons. The arrangement between Camden and Winchester was reduced to writing, in the shape of a letter directed to Bernard L. Butcher, and signed by said Winchester, on the 3d day of July, 1887. Winchester, Hutton, and Butcher, all of whom are made parties to this suit, fully admit the truth of this arrangement. Dewing & Sons deny they knew anything of it, and claim they were wholly taken by surprise when the plaintiff demanded a deed from them for these Caperton lands and they refused to be bound by the arrangement so made. Winchester, Butcher, and Hutton, in their depositions, claim that Dewing & Sons, through their representative, William S. Dewing, were fully informed of the arrangement, and acceded thereto, but insisted that, as he paid for the lands the title thereto should be vested in him, and he be permitted to settle with plaintiff and hold the title for him. The Dewings deny this in their testimony. This presents but two propositions for the consideration ot this Court: (1) Is this such a contract as a court of equity will enforce? (2) Is the proof sufficient to sustain the decree?

1. As to the first proposition, there can be no doubt. If the title to the property still remained in Winchester and Hutton, equity would promptly enforce specific performance. They do not deny it, but admit it. It is true, no money has been paid as yet, by the plaintiff. But this was not the consideration for the agreement. The consideration was the withdrawal from competitive purchasing, by which they were enabled to purchase all the lands cheaper than they might have otherwise done. This was in good faith fully carried out by the plaintiff. Withholding competition, when not opposed to public policy, is a sufficiently binding consideration. 6 Am. & Eng. Enc. Law (2d ed.) 746. It is a supreme duty of a court of equity and conscience to prevent fraud. Browne, St. Frauds, p. 557, and *Id.* p. 571, § 448*a*. "The fraud," says Judge Wells in *Glass* v. *Hulbert*, 102 Mass. 24, "most commonly treated as taking an agreement out of the statute of frauds, is that which consists in setting up the statute against its performance after the other party has been induced to make expenditures or a change of situation in regard to the subject-matter of the agreement, * * * so that the refusal to complete the execution of the agreement is not merely a denial of rights which it was intended to confer, but the infliction of an unjust and unconscientious injury and loss. In such case the party is held by force of his acts * * * to be estopped from setting up the statute of frauds." The plaintiff in this case, by force of his agreement with Winchester, changed his situation with regard to the subject-matter thereof so that the refusal to enforce such agreement is the infliction of an unjust and unconscionable injury and loss upon him, in addition to the denial of rights which it was intended to confer. If the agreement had not been entered into, not only could plaintiff have purchased the Caperton lands, but he could also have purchased the Dewing lands, or forced Winchester to pay a much higher price therefor. Winchester, Hutton, and Butcher received the full benefit of the agreement with plaintiff; and, if it had not been reduced to writing by Winchester, it could have been enforced against them, notwithstanding the statute of frauds. They, however, neither deny it, nor in any manner resist it, for they

have parted with all interest therein to Dewing & Sons. Hutton, holding the legal title to these lands, was undoubtedly trustee for plaintiff; and his conveyance to Dewing & Sons was a breach of trust, unless they succeeded to the trusteeship, as the trustee would have the right to withhold the title until the purchase money was paid, of which the purchaser is the trustee. 11 Am. & Eng. Enc. Law. (2d Ed.) 181.

2. Is the proof sufficient to sustain the decree? Are Dewing & Sons innocent purchasers for value, or did they assume the trust undertaken by Winchester, or buy the lands with notice of the existence of such trust? Notice, to be sufficient, is such facts and circumstances as will put a person on inquiry. *Cain* v. *Cox*, 23 W. Va. 609. This is not a question of notice, but whether Dewing & Sons took the land subject to the trust that existed against them in the hands of their grantor. Winchester was the general agent for Dewing & Sons, and he, in conjunction with Hutton and Butcher, in accordance with their agreemnet with plaintiff, purchased the Gauley lands,—not, apparently, in the beginning, for Dewing & Sons; but, being authorized by Hutton to sell the land for not less than two dollars per acre, he made an arrangement with his principals by which they ostensibly became the purchasers at the agreed price, but actually they were to have all the benefits to accrue to him from such purchase, in the full enjoyment of the profits which otherwise would be his alone. This at least was an after ratification of all his acts and conduct in relation to such purchases. They could not possibly take the benefits of his purchases, and not assume the liabilities thereof. Though he might not have been their agent in the beginning, he became so when they accepted the profits of his labor, which agency must extend back, and include the inception of such labor; for they pay him only for his time and expenses, and keep his earnings. Accepting the benefit, they must assume the liabilities; otherwise, they take from him the power to meet such liabilities, without recompense, and leave those to whom he is under obligation to bear the loss. If Winchester intended such a result, he would be guilty of fraud; and if they retained the fruits of such fraud after notice thereof, they

would be pari delicto with him, and subject to the same legal responsibilities. Winchester says he is not guilty of fraud, for the reason that when he permitted all the lands to be deeded to Dewing & Sons he had a perfect understanding with them, through William S. Dewing, that they were to assume all his legal obligations to the plaintiff. Butcher and Hutton corroborate him. William S. Dewing, enjoying the full benefits of the agreement with plaintiff, except Hutton's share thereof, and with Winchester's profits in possession, denies there was such an understanding at the time, and before he took the title to the lands. Here the oral proof is conflicting, with the preponderance, in number of witnesses, at least, with plaintiff, and the circumstances strongly corroborative thereof. It is true that plaintiff has never paid any of the purchase money on the lands. Neither were the deeds ever executed and tendered to him, nor a proper demand made for such purchase money. The evidence is very conflicting. The witnesses swear positively, and contradict each other directly. Either on one side or the other, the witnesses are guilty of false swearing. Which side it is, it is not for this Court to determine. The circuit court has found for the plaintiff. Its finding cannot be disturbed unless it has decided against the plain preponderance of the evidence. This has been held so often by this Court that it seems almost useless to repeat it. The decree may be wrong, but we cannot say so. If we would disturb it, it would be only a matter of opinion, about which all reasonable men might differ. We cannot run the risk of doing a greater wrong, to prevent a wrong that we cannot say exists. If the Dewings have set up a false plea of being innocent purchaser, to defeat the contract between plaintiff and Winchester, that they may enjoy the fruits thereof without compensation, the statute of frauds furnishes them no protection whatever. Having obtained the title through assurances that they would convey it to plaintiff, to allow them to hold it would be to permit them to take advantage of fraudulent conduct, against which equity always furnishes relief. *Currence* v. *Ward*, 43 W. Va. 367, (27 S. E. 329); *Potts* v. *Fitch*, (decided at this term) (27 S. E. 329). The law being against them on the facts as determined by

the circuit court from the evidence, the decree must be affirmed.

Affirmed.

CHARLESTON.

NEAL *et ux.* v. OHIO RIVER R. CO.

47 316
e56 497
47 316
j66 540

Submitted Sept. 12, 1899—Decided Dec. 9, 1899.

1. WATER-COURSE—*Abstruction—Damage*

A water course consists of bed, bank, and water. Yet the water need not continually flow, as many streams are sometimes dry. There is a difference between a water course and an occasional outburst of water which, at times of freshet, from rain or snow, descends from the hills and inundates the country. To be a water course, it must appear that the water usually flows in a certain direction, and by a regular channel, with banks or sides. For obstructing or diverting a water course, and thereby damaging another, the party is liable. (p. 319).

2. SURFACE-WATER—*Abstruction—Damage.*

Surface water is water of casual, vagrant character, oozing through the soil, or diffusing and squandering over and under the surface, which, though usually and naturally flowing in known direction, has no banks or channel cut in the soil; coming from rain and snow, and occasional outbursts in time of freshet, descending from mountains or hills, and inundating the country; and the moisture of wet, spongy, springy, or boggy land. For obstructing or diverting surface water, though damaging another, the party is not liable. (p. 319-320).

3. OWNER'S RIGHT—*Crop—Damage.*

The owner of land, who has leased it to a tenant for a share of the crop, may sue for a tort of a wrongdoer damaging the growing crop. (p. 321).

Error to Circuit Court, Wood County.

Action by Paul and Sarah M. Neal against the Ohio River Railroad Company. Judgment for plaintiffs, and defendant brings error.

Reversed.

MOATS & PETERKIN, for plaintiff in error.

H. P. CAMDEN, for defendants in error.

BRANNON, JUDGE:

This is an action by Neal and wife against the Ohio River Railroad Company, in Wood County circuit court, resulting in a judgment for plaintiffs for two hundred and fifty dollars upon demurrer by defendant to the evidence.

1. It is claimed that there is a variance between the title as pleaded in the declaration and that shown in evidence. The declaration alleges the plaintiffs as seised and possessed of a tract of land, whereas a life estate is shown. That allegation is sufficient to admit evidence against a wrongdoer for tort for damage to any estate,—years, life, or fee. *Clay* v. *City of St. Albans*, 43 W. Va. 539, (27 S. E. 368). It would cover injury merely to the possession, or permanent to the fee. The deed tor the life estate is dated after the building of the fill alleged as the cause of damage. That makes no difference, because plaintiffs were in actual possession when it was made, presumably under some kind of title, as possession is *prima facie* evidence of some title; but, further, that deed had been made when the damage happened, and action accrued from the actual damage, not from the making of the fill. *Henry* v. *Railroad Co.*, 40 W. Va. 234, (21 S. E. 863). No need to allege the life estate. An alleged ground of variance is that the declaration says that plaintiffs were seised of a tract of one hundred and forty acres of land, which by right they ought to have enjoyed free from overflow of the waters of a "natural run, stream, or creek," and that the company "made a fill across a channel or ravine, and the natural drain, run, or stream therein, through which channel or ravine there flowed a natural running stream of water, which stream of water and the channel aforesaid is the outlet for a pond on plaintiffs' land, and which stream

or drain arose easterly from said pond, and flowed through plaintiff's land, across or through the right of way of defendant company, and emptied itself in the Ohio river. And defendant so negligently made and constructed said fill that the waters which flowed down said natural water course could not escape and discharge themselves from the land of plaintiffs." It further alleged that the company failed to make an opening or outlet through the fill, by which alone the waters in said water course could discharge themselves, and thus caused the waters flowing down the water course to be diverted from their channel; and the waters were accumulated and spread over the land, and there remained for months, dammed up, injuring crops, pasture, shade trees, depositing sand, gravel, and debris, and causing a lake or pond of filthy water, from which arose sickening stench and foul vapors, rendering the plaintiffs and their family uncomfortable, and endangering their health. If it is intended by counsel to base this variance between allegata and probata on the theory that, while the evidence might show the outlet from the pond to the river across the railroad to be a water course, that section east of the pond is not so shown, I think it untenable; for if only the outlet from pond to river be a water course, in law, that would avoid variance, though the drains into the pond could not be so considered.

2. But I suppose the claim of variance is based chiefly on the theory that the declaration bases recovery on the obstruction of a water course, which would be ground of action, whereas the evidence shows no water course, but only surface water, the obstruction of which would not be actionable, though doing damage to the plaintiffs. This concerns the merits of the case. The subject of liability on account of obstruction of surface waters has been discussed in *Jordan* v. *City of Benwood* 42 W. Va. 312, (26 S. E. 266), 36 L. R. A. 519; *Yeager* v. *City of Bluefield*, 40 W. Va. 259, (21 S. E. 752); and *Clay* v. *City of St. Albans*, 43 W. Va. 539, (27 S. E. 368). In the first case it is said that the same rule of liability as to surface water applies to railroads as to individuals. So, 24 Am. & Eng. Enc. Law, 950. The common-law rule as to surface water, not the civil-law rule, prevails with us. By it, a railroad company is not

liable for obstructing what is merely surface water, though so doing injures another. Authorities just cited. Many decisions hold otherwise, but they are in states where the civil-law rule prevails. Therefore we must see whether the water obstructed in this case was only surface water or a water course. On this land, in a basin or depression, there had been always a pond, covering half an acre in natural state, used for watering stock, fed by water from rain and snow gathered over a considerable area, conducted from hills back of it by several ravines,—so to call them. This pond always had water in it. It had an outlet to the Ohio river by means of a channel cut by the water, through which, when too full, it discharged itself, twenty or twenty-five feet wide, where it ran under a trestle of the railroad before the fill was made where the trestle had stood. The channel was not deep under the trestle, having a wide space to spread out; but thirty yards from the trestle it narrowed, and the ravine or channel was very deep. This stream had been running under the trestle ten years, and had always been there. Great quantities of water came down from the hills through this pond; sometimes, in heavy rains, bringing down great stones and other debris. Before the fill was made, this water freely flowed into the river. The water in this pond covered, in natural state, half an acre, for the depth of three feet; and any rise would go off by the said outlet to the river. It was never dry, and, when rains or snow came, it received and discharged much water. I do not regard the four ravines or drains going into the pond as water courses. But how as to the pond and its outlet? "A water course consists of bed, banks, and water. Yet the water need not flow continually, and there are many water courses which are sometimes dry. There is, however, a distinction in law between a regular, flowing stream, which at certain seasons is dried up, and those occasional bursts of water which in time of freshet, or melting of ice or snow, descend from the hills and inundate the country. To maintain the right to a water course or brooks, it must appear that the water usually flows in a certain direction, and by a regular channel, with banks and sides. It need not flow continually, and it may at times be dry, but it must have a well-

defined and substantial existence." Ang. Water Courses, § 4. I regard the outlet from this pond as complying with this definition. There was a quantity of water regularly passing, considerable except in droughts, in one, and only one, direction; not squandering and wandering over the surface as surface water does, but in a defined channel, over a bed, between banks,—through a channel cut by the waters long ago. Justice Brewer is very accurate in saying: "For a water course, there must be a channel, a bed to the stream, not merely low land or depression in the prairie over which water flows. It matters not what the width or depth may be, a 'water course' implies a distinct channel; a way cut and kept open by running water; a passage whose appearance, different from that of the adjacent land, discloses to every eye, on a mere casual glance, the bed of a constant or frequent stream, not a mere depression; and such flow must be necessary to prevent the flooding of a considerable tract of land." *Gibbs* v. *Williams*, 37 Am. Rep. 241. I do not see why this stream does not fill this measure. Here was the pond, a material element, made up by various incoming drains. Gould, Waters, § 263, says that "mere surface water may be said to form a water course at the point where it begins to have a reasonably well defined channel, with bed and banks or sides, though the stream itself be very small, and the water may not flow continuously, and surface water ceases to be such after entering within the banks of a water course." See 24 Am. & Eng. Enc. Law, 904. It seems to me that this large quantity of water collected in this pond, and going from it as constantly as water came in the usual course of nature, by a fixed channel, over a fixed bed, is not mere surface water. It originated in rains. So do all streams. But when it reached this pond it lost the character of surface water. And it would seem to be a harsh rule that would allow any one on the theory of its being only surface water, to dam it up, and overflow and destroy his neighbor. This water does not answer the definition of "surface water;" that is, "waters of a casual and vagrant character, which ooze through the soil, or squander themselves over the surface, following no definite course. Though customarily and naturally flowing in a known direction and

course, they have nevertheless no banks or channels in the soil and include waters diffused over the surface of the ground. When surface waters reach, and become part of, a natural water course, they lose their character as surface water, and come under the rules governing water courses." 24 Am. & Eng. Enc. Law, 896. Water coming no one knows whence, flowing no one knows just how, underground or on the surface, but not in any channel, either from rain or springs, in a direction no one can say. So, I conclude this was a water course. But suppose this were questionable. The company filled the trestle, and put in a culvert of tile, and thus recognized and treated it as a water course, and cannot now be heard to say that it is not a water course, and be exempt from liability for damming water on Neal's land, covering ten acres, for weeks or months; making a lake deep enough for a steamboat, and injuring sod and crops, and "firing" crops on additional land; injuring twenty acres of corn and some oats. The pond was thus made thirteen feet deep. The company cannot be justified in so doing, if in fault.

3. Is the company in fault? The evidence is conflicting. Deciding the case upon a demurrer to evidence, we find the company in fault: First: Because the tile constituting the water way placed by it was inadequate in size to carry off the water in heavy rains. Neal objected to it on that score at the time, and warned those inserting it that he would hold the company responsible for damage. Second. Because the tile was broken by rock and large, hard, dry lumps of clay thrown from dump cars upon it a height of twenty feet, so that it soon broke in and stopped —entirely closed—the passage of water. Neal opposed the company's going to the fill over the broken tiles, but the work went on. It is suggested, perhaps as variance, that a field was leased to a tenant for cropping in corn. Still, there was other land damaged to justify recovery. And that field was leased, the rent to be paid in a share of the corn, which entitled Neal to sue for damage to the corn. There was no evidence given of damage, beyond that to the enjoyment of possession; no damage to the freehold, as distinguished from that to the life tenant.

4. It is argued that this injury came from the act of

God, the rain being extraordinary. The evidence shows that it was very heavy, but not extraordinary,—only such as had before fallen, and such as was surely to be expected at times.

Judgment Reversed.

ADDENDUM.

The evidence of Neal clearly shows that when the tiling was being put in he was present, and saw the tiling broken by the large lumps of hard clay and a large rock thrown from the dump cars upon the tiling, and that he protested against its being covered up in that condition, but the company's hands did cover the broken tile up, and that, the first rain that came, the tiling failed to carry off the water, but it worked its way through ultimately; that the next heavy rain, the slight opening that had slowly and poorly carried off the water became entirely closed, and the tiling carried off no water, which resulted in the great lake of water spoken of in the foregoing opinion, standing there many days, causing the damage sued for. That lake was three feet higher than the back water of the Ohio river at its highest, showing that that backwater did not do the damage. That is beyond question. Under a demurrer to evidence, we cannot exclude this evidence of Neal; but I make this note,—that the undisputed physical facts say that Neal tells the truth. That water lay there long after the Ohio fell. Who believes that it would have done so, had the passage through the tile been open? That it was not open, no one disputes. When did it close? Is it likely that the mere weight of earth on this tiling broke it down after it was put in? It is not. But does not the fact, which is beyond dispute, that it was found broken, and would not carry water, conclusively confirm the statement and claim of Neal that it was in a damaged condition when put in? Under these known physical facts, it is utterly unreasonable to say that Neal falsifies. This condition of the tile alone renders the company liable, even if we say that the tile was of sufficient size to carry the water away, had it not been broken.

CHARLESTON.

BOWLBY v. DE WIT.

47 323
f48 247
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47 323
e53 235
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56 243
47 323
f65 248

Submitted Sept. 12, 1899—Decided Dec. 9, 1899.

1. ATTACHMENT—*Levy—Lien.*

An attachment, is a lien on personal estate from levy though no bond be given to authorize the officer to take possession, and one purchasing of the debtor with notice of the levy takes subject to it. (p. 324).

2. APPEALS—*Joinder.*

Where one party only appeals, and the rights of him and another stand on distinct and separate grounds, and are not equally affected by the decree or judgment, that appeal will not bring up for adjudication the rights of the other; but when their rights are not only involved in the same question, but equally affected by the decree or judgment, the appeal of one will call for an adjudication of the rights of the other not appealing. But in the former case, if the party not appealing appears in the appellate court and assigns error, he unites in the appeal, and his case will be considered. (p. 325).

3. PURCHASER—*Title—Attachment.*

The title of one who purchases of an attachment debtor property levied under it with intent to defeat such levy is void as to it. (p. 327).

4. PURCHASER—*Lis pendens.*

Lis Pendens and pendents lite purchasers referred to. (pp. 326-327.

Appeal from Circuit Court, Ritchie County.

Bill by C. H. Bowlby against Ira De Witt and others. Decree for plaintiff, and De Witt alone appeals.

Affirmed.

R. S. BLAIR, Jr., for appellant.

ROBINSON & PIERPONT, for appellee.

BRANNON, JUDGE:

Bowlby brought a suit in equity in the circuit court of

Ritchie County against De Witt to recover a debt arising from judgments against De Witt in Pennsylvania, and sued out an attachment against the estate of De Witt on the ground of his nonresidence and fraud, which was levied on the eighth interest of De Witt in certain oil leases and personal property, and certain other personal property in which he owned the entirety. The property levied on was conveyed by Rowland to Dewitt by deed dated June 8, 1898, and was levied on July 5, 1898, and reconveyed by De Witt to Rowland August 3, 1898. Rowland filed his petition setting up his claim to the property as exempt from the attachment. The case ended in a decree for Bowlby's debt against De Witt,—he having answered,—and directing the sale of the property levied upon, and De Witt alone appealed.

It is assigned as error that equity has no jurisdiction of the case, as there is adequate remedy at law. I take it that it is unnecessary to do more than say that equity has jurisdiction of a suit upon a purely legal demand against a nonresident, with an attachment levied on property. Code, c. 106, s. 1; *McKinsey* v. *Squires*, 32 W. Va. 41, (9 S. E. 55).

It is assigned as error that the Sunlight Oil, Gas and Refining Company is not a party. Why should it be? The bill did state, as showing fraudulent transfers by De Witt to defeat the plaintiff's recovery of his debt, as one of his acts, that De Witt had transferred some property to that company, but did not charge fraud on the company, nor ask, nor did the plaintiff get, any decree against that property. That property was not levied upon under the attachment, nor proceeded against in the bill, nor touched by the decree. It was pretended by Rowland that he transferred some property to De Witt, as agent for that company, for advances of money on work Rowland was to do for it; but, if this was the truth, it was not so stated in the deed, and Rowland swears positively that the company had been repaid and its right ended, and DeWitt distinctly swears the same; and he conveyed back to Rowland, and thus said company had not a shadow of interest. Its rights would be void for want of record, if it had any. *Poling* v. *Flanagan*, 41 W. Va. 191, (23 S. E. 685).

It is assigned as error that the claim to the property set up by Rowland was disallowed. Rowland did not unite in the appeal, but it is argued that the appeal of De Witt brings the whole case up. We are referred to *Walker's Ex'r* v. *Page*, 21 Gratt. 636, to show that where parties appealing stand on the same ground as those not appealing, and their rights are involved in the same question, and equally affected by the same decree or judgment, the court of appeals will settle the rights of all. But the rights of De Witt and Rowland are not equally and likewise affected. The decree is personal against De Witt,—not against Rowland at all. De Witt disclaims title in the property sold. Rowland alone claims it. It is Rowland's property that is held liable. His title only is affected, and, if dissatisfied, he should defend it by appeal. If the decree were reversed as to Rowland, De Witt would not get the property or profit by it. The case cited shows that where the rights of two parties are separate, and not equally affected by the decree, the appeal of one will not bring up the rights of the other for adjudication. So does *Shoe Co.* v. *Haught*, 41 W. Va. 275, (23 S. E. 553). If Rowland were appealing, he could complain that the debt was wrongly decreed against De Witt, because interested in that question, as it established a debt affecting his property; but De Witt loses nothing in the property, because he expressly disclaims interest in it. *Tate* v. *Liggat*, 2 Leigh, 84, was a suit to cancel a fraudulent deed from A. to B., and B. appealed. Though the decree as to B. was reversed, yet the decree against A. for the debt could not be on B.'s appeal. This shows the separate interests in our case. As the decree is good as to De Witt, we could not reverse that clause of it denying, validity of Rowland's claim,—he not appealing,—merely on De Witt's request. But, Rowland having appeared in this court and assigned error, I think that we must consider his case, as if he had appealed, because he thus unites in the appeal, and because an affirmance would bind him, as a finality, and therefore he ought to be heard. *Blowpipe Co.* v. *Spencer*, 46 W. Va. 590, (33 S. E. 342). Rowland purchased of De Witt some time after the levy of the attachment. Code, c. 106, s. 9, gives a lien from levy. Anybody purchasing of the debtor

after levy is by common law a pendente lite purchaser, and takes subject to the lien of the attachment, whether he had notice or not. "A purchase made of property actually in litigation, pendente lite, though for valuable consideration, and without actual notice, is yet subject to the decision of the suit; and this doctrine is based, not on the presumption of notice, but on reasons of public policy, which make it indispensable, in order to prevent an indefinite multiplication of suits, and give effect to the determination of courts." Bart. Ch. Prac. 1087; *Wilfong* v. *Johnson*, 41 W. Va. 283, (23 S. E. 730); *Stout* v. *Mercantile Co.*, 41 W. Va. 340, (23 S. E. 571). A purchaser takes subject to the attachment. 3 Am. & Eng. Enc. Law (2d Ed.) 215. An attachment at common law is notice of its lien. This doctrine of notice arising from the mere pendency of a suit to recover specific property, real or personal, is still the law. The act requiring record of lis pendens (Code 1891, c. 139, s. 13) applies only to suits to charge real estate with debt, not to suits to recover it. *O'Connor* v. *O'Connor*, 45 W. Va. 354, (32 S. E. 276). It applies neither to suits to recover nor suits to charge personalty. *Osborn* v. *Glasscock*, 39 W. Va. 749, (20 S. E. 702). But it is claimed that by section 9, chapter 106, if no bond be given under section 6 to authorize the officer to take possession of the property levied on, and the property is sold by the debtor for valuable consideration, the lien of the attachment ceases. Undoubtedly this works a change from the rule of the common law as to pendente lite purchasers. Under it the mere suit is not notice. But it works such change only in favor of an honest purchaser,—one without notice of the attachment. The statute does not mention notice, but it is to be implied; for it cannot be possible that as the statute gives a lien, though no bond be given, it intended to nullify that lien in favor of one having full notice of the creditor's prior right, and thus overturn, in this particular instance only, the law which in other cases (such as second purchasers or mortgagees taking with notice of prior conveyance or mortgage or judgment) subordinates the second man to the prior purchase or lien. It does not give such premium to fraud. The said statute requiring a lis pendens of suits affecting land to be recorded expressly

says it shall not be necessary as to purchasers with notice. That applies to attachments. One purchasing land with notice of it is affected, though no lis pendens is recorded. Of course one purchasing chattels with notice of an attachment would be in no better condition. The attachment levied is a lien without bond. That is only necessary if desired to take the actual possession by the officer. Why give bond to take actual possession of an undivided eighth in oil leases,—the chief property levied on in this case? The officer could not take actual possession. What good does a bond do as to a debt garnished? The clause referred to in section 9 merely abolishes the above rule of the common law as to suit alone being notice by requiring notice otherwise in the case of personalty levied under attachment. "When one purchases without actual or constructive notice of a prior attachment and for good consideration he is a *bona fide* purchaser, and his title will be good against the world. But if he have any notice whatever of the prior attachment, he will take in subordination to it." 1 Shinn. Attachm. § 421; Wap. Attachm. § 830. Now Rowland, does not, in his petition, allege that he purchased without notice of the attachment lien. "In setting up a *bona fide* purchase for value without notice, the consideration must be stated, with distinct averment that it was *bona fide*. Notice, whether charged or not, must be denied previous to, and down to the time of, paying the money and delivery of the deed." 16 Am. & Eng. Enc. Law 836. "The plea must also deny notice of the plaintiff's title or claim previous to the execution of the deed, and payment of the consideration." Story Eq. Pl. § 806. He must both aver and prove want of notice. Rowland did neither. He was a witness. He made no pretense that he did not know of the attachment,—virtually says he did. Besides this transfer back to Rowland from De Witt was with intent to defraud Bowlby. Their own evidence shows it. Rowland was asked why he had transferred the property to De Witt, and, after equivocating, he said, "This has come on rather sudden, and I would ask for a little time to consider." Why not answer out? In a second examination he admitted that he did so to keep the property from his creditors. Then when De Witt, in a few weeks only, gets into trouble

and is sued, and the property is levied, he transfers it back to Rowland. All the circumstances show plainly that they united in shifting this property from one to the other to defeat creditors. This conveyance to Rowland was fraudulent in fact as to Bowlby.

Even if I were wrong in the opinion above expressed as to notice destroying the purchase, if honest, the fact of this fraudulent intent would annul it. Bowlby's deposition is so unsatisfactory, contradictory, and evasive, that it establishes fraud. His suppression of the deed to himself is a strong circumstance. Why keep it from the record?

As to the claim that a jury should have tried the right of property: This is a chancery suit, and the jury right does not exist in chancery. Long before the constitution of the new state, giving jury trials in controversies at common law, equity exercised jurisdiction of attachments in equity, and the constitution gave the jury only in trials at common law. Bear in mind that Rowland's purchase was after the levy, and his petition did not plead the defense of *bona fide* purchaser, and therefore it showed no *prima facie* case of title. If true in every word, it showed no title in Rowland. President Johnson, in speaking of a similar point in *Chapman* v. *Railroad Co.*, 26 W. Va. 327, said: "It certainly cannot be contended that a proper construction of this section will permit mere naked legal questions to be submitted to a jury. This section cannot be so construed. If the petition shows a prima facie right in the petitioner to the property,—a title better than that of the defendant,—then the court should impanel a jury to inquire into the claim; but if the petition shows clearly that at the time the attachment was levied the petitioner had no claim to the property, no interest in it, it would be folly to impanel a jury to inquire into a claim which the petition itself showed did not exist. The case of *Anderson* v. *Johnson*, 32 Gratt. 558, is in harmony with this view. There the petition, if true, showed the petitioner had purchased the property before it was attached." Decree affirmed.

Affirmed.

CHARLESTON.

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KESTER *et al.* *v.* ALEXANDER *et al.*

Submitted September 9, 1899—Decided December 9, 1899.

1. BILL—*Answer—Injunction—Dissolution.*
When a case is heard regularly on a bill and answer (the answer denying the material allegations of the bill) and general replication exhibits, and upon a motion to dissolve an injunction, in the absence of evidence tending to prove the material allegations of the bill it is error in the court to refuse to dissolve the injunction. (p 331).

2. MOTION—*Continuance—Dissolution.*
It is a general rule not to continue a motion to dissolve an injunction unless from some very great necessity, because the court is always open to grant, and, of course, to reinstate, an injunction whenever it shall appear proper to do so, and because, too, the plaintiff should always be ready to prove his bill. (p. 331).

3. INFANTS—*Next-Friend—Removal.*
Where a person is guardian for infant children, and institutes as their next friend, also, a suit to protect their interest in reference to a trust estate which is being administered by a trustee, which suit is decided adversely to his wards, and a suit brought by said infants, acting by another next friend, to remove him as their next friend, for refusing to appeal the case, the court should exercise great caution in removing such next friend, and be certain that he has violated his duty before removing him. (p. 334).

4. EQUITY—*Trust—Trustee.*
Equity will not interfere with a trustee in the proper discharge of the duties of his trust. (p. 335).

Appeal from Circuit Court, Harrison County.

Bill by C. M. Kester and others, by W. G. Kester, their next friend, against J. I. Alexander and S. S. Faris. Decree for defendants, and plaintiffs appeal.

Affirmed.

LEWIS C. LAWSON and MELVILLE G. SPERRY, for appellants.

JOHN BASSEL, C. W. LYNCH and HARVEY W. HARMER, for appellees.

ENGLISH, JUDGE:

This appeal was awarded from an order of the circuit court of Harrison County dissolving an injunction granted by JUDGE BRANNON, on the 19th of April, 1898. The appellants, who are infants, brought a suit in equity in the circuit court, by their next friend, John I. Alexander, to enjoin and restrain Samuel S. Faris from selling and disposing of the estate of J. B. Sandusky, which had been assigned to him by Sandusky on the 6th of January, 1898; also to convene his creditors, and ascertain the amounts and priorities of their claims. In that case an injunction was granted on April 1, 1898, which was dissolved on notice and motion April 9, 1898. John I. Alexander declined to apply for an appeal from the decree dissolving said injunction, but W. G. Kester, a relative of said infant children, as their next friend, instituted this suit for the purpose of having said Alexander removed as the next friend of said infants, and to obtain another injunction to restrain said Faris from selling and disposing of the estate of said Sandusky until Alexander could be removed, and an appeal obtained from the order dissolving first injunction. This bill was presented to a circuit judge, who declined to grant it, and the same was subsequently presented to JUDGE BRANNON, of this Court, who, on April 19, 1898, as above stated, granted the injunction prayed for. On the 9th of May, 1898, the appellees gave notice that on the 11th, same month, they would move Judge Hagans to dissolve said injunction, which was done, the injunction dissolved, and this appeal applied for and obtained.

The appellants claim the court erred: First. Because the notice given of the motion to dissolve said injunction was not such reasonable notice as is required by law to be given in like cases. The record shows that the notice was served on W. G. Kester, next friend of plaintiffs, on May 9, 1898, and was returnable on the 11th of same month.

The circuit court was then in session, and said motion was not acted upon until May 16th, when counsel for the appellants was present. The record shows that the plaintiffs had seven days in which to make preparation to meet the motion to dissolve. Affidavits were presented in opposition to the motion to dissolve, and a motion to quash the notice was made, which was overruled; so that the plaintiffs do not appear to have been prejudiced by want of time to meet the motion. Now, while it is true that section 12 of chapter 133 of the Code provides that the opposite party must have reasonable notice in writing of a motion to dissolve an injunction before a judge in vacation, yet, where the motion is made in open court in term time, such notice is not required. See *Sulphur Springs Co.* v. *Robinson*, 3 W. Va. 542, where it is held: "It is not a valid objection to an order dissolving an injunction that no notice of the motion to dissolve was given, when the motion was made in court, if there was no equity in the bill. Nor is there error in dissolving under like circumstances, without an answer." The defendants had filed their answer under oath, and under the practice the plaintiff should at all times be in readiness to meet a motion to dissolve. See *Horn* v. *Perry*, 11 W. Va. 694, where it is held that: "It is a general rule not to continue a motion to dissolve an injunction unless from some very great necessity, because the court is always open to grant, and, of course, to reinstate, an injunction whenever it shall appear proper to do so, and because, too, the plaintiff should always be ready to prove his bill." See, also, *Arbuckle* v. *McClanahan*, 6 W. Va. 101, in which this Court holds that: "When a cause is regularly heard on a bill and answer (the answer denying the material allegations of the bill) and general replication, exhibits, and upon a motion to dissolve an injunction, in the absence of evidence tending to prove the material allegations of the bill it is error in the court to refuse to dissolve the injunction, and refer the cause to a commissioner to take the account prayed in the bill." See, also, *Radford's Ex'rs* v. *Innes' Ex'x*. 1 Hen. & M. 7; *Shonk* v. *Knight*, 12 W. Va. 667 (Syl., point 3).

The second assignment of error claims that it was not proper to dissolve the injunction upon the bill and answers

thereto, to which answers there were general replications by the plaintiffs, made before the same was dissolved. Now, as to the effect of an answer, our Code (section 59, chapter 125) provides, that, "when a defendant in equity shall in his answer deny any material allegation of the bill, the effect of such denial shall only be to put the plaintiff on satisfactory proof of the truth of such allegation." The answers filed in this case, as I read them, are mere denials of the allegations of the bill, and do not allege any new matter constituting a claim for affirmative relief, and therefore there was no necessity for a special replication. As to the effect of a general replication, it only puts in issue negative all allegations contained in the answer except such as call for affirmative relief, and asserts that the plaintiff will sustain and prove his bill. The case was submitted without any proof in support of the allegations, but upon the bill, answer, and two affidavits denying what the appellants claim are immaterial averments in the answers of Faris and Alexander, which pertain to the conduct of said Alexander in reference to taking the appeal. So far, then, as the material allegations were concerned, the case was heard upon the bill and the answer, sworn to, denying the allegations, and this Court held in the case of *Cox v. Douglass*, 20 W. Va. 175, that "an injunction will be dissolved at the hearing of a motion to dissolve on bill and answer, sworn to, if the answer fully, fairly, plainly, distinctly, and positively denies the allegations of the bill."

The third assignment of error claims that the answers of Faris and Alexander have been rejected for reasons set forth in the exceptions thereto. I deem it necessary only to say that there are statements to be found both in the bill and answers that might well have been omitted, as the records of a chancery cause are not the proper place for counsel to deal in personal reflections and recriminations; and the matters to which the exceptions refer do not pertain to the merits of the case.

The fourth assignment of error claims that it was not proper to dissolve the injunction upon the filing of said answers, and upon the state of pleadings thereby presented, and the facts shown to exist upon the face of said bills and answers thereto filed in said causes, and the exhibits there-

with filed. This assignment may be considered with the fifth one, which claims that it was improper and erroneous to dissolve said injunction, or permit Faris to sell said lands, while the chancery causes were still pending and undetermined, and the rights and interests of said petitioners still unsettled in the chancery cause pending in the court of appeals, while the financial condition, debts, and liabilities of said Sandusky were undetermined and unknown, the lands sought to be sold by Faris still burdened by said preceding judgment, liens, and deeds of trust, and the legal title to the lands outstanding in other trustees, and said Farris only held the equity of redemption under said trust so executed to him by said Faris, Sandusky, Pell, Blair, and Dunkin, trustees, and all creditors of Sandusky had been properly brought into a court of equity in a chancery cause brought to ascertain the liens thereon, and to subject said land to the payment of the liens and charges thereon in a way and manner provided by law. In considering the questions raised by these assignments of error it is proper to revert to the fact that two suits were instituted, the first having for its object the prevention of Faris, as trustee, from making sale and disposition of the property described in a deed of trust executed to said Faris by J. B. Sandusky and wife, dated January 6, 1898, and to convene the creditors of Sandusky, and ascertain his debts and liabilities, before any disposition of the property was made, which suit was brought by John I. Alexander, as next friend of the appellants. After the injunction had been obtained and dissolved as aforesaid, Alexander declined to apply for an appeal, and the second suit was brought by W. G. Kester, as next friend, for appellants, having for its object the removal of Alexander as next friend in the chancery cause, and to enjoin Farris from making sale of Sandusky's property under said trust deed, which injunction was granted and dissolved, and is now before us on appeal. It is perceived that one of the main objects of this suit was the removal of Alexander as next friend of appellants. He was not only the next friend, but their guardian, and as such we must presume he had given bond adequate to protect his wards from any loss by mismanagement of their estate.

He seems to have been selected by the mother of these infants, and she was satisfied with his management, and his appointment by the court is an indication that his character was such as to suggest him as a proper man for the position. In this suit he became acquainted with the proposed action of Faris, as trustee, with reference to the sale of Sandusky's property; and when the circuit court passed upon his bill adversely to the claims therein asserted, he, as guardian of said infants, and their next friend, did not deem it advisable to appeal. The office of guardian is one in which much discretion should be exercised, and if he, in good faith, looking to the best interests of his wards, became satisfied that their interests would be promoted by allowing the decree to stand, either from the fact that the trustee, Faris, had given a forty thousand dollar bond, which would amply protect all parties interested as creditors in the property conveyed to him as trustee, or from the fact that he saw indications that his wards' property was in danger of being frittered away in litigation that might be avoided, can we say a court of equity would be warranted in removing him as such next friend, and substituting another in his stead, when there is nothing to show that his action in declining to take the appeal was inconsistent with the acts of a prudent guardian looking to the best interests of his wards? I would say we should not so hold, unless it clearly appears that such refusal was at variance with their best interests.

Again, we may with propriety ask, why should the court interfere to prevent the trustee, Faris, from carrying out the requirements of the trust executed to him by Sandusky and wife on January 6, 1898? As we read that trust deed, it is manifest that the main object of the grantor was to secure those to whom he was indebted, and to satisfy their claims with as little expense as possible by avoiding litigation; and, in order that his creditors might be protected from loss in any manner by the acts of said trustee, he required Faris to enter into bond in the penalty of forty thousand dollars, bearing even date with said trust deed, conditioned for the faithful performance of his duties as such trustee, and that he would account for all money coming into his hands by virtue of such trust. So far as the

record in this case discloses, Faris was proceeding in good faith to execute and carry out the provisions of said trust deed when the injunction was awarded, and, no misconduct having been shown on his part in the discharge of his trust, the injunction was properly dissolved as to him. In the case of *Righter* v. *Riley*, 42 W. Va. 633, (26 S. E. 357), this Court held that "equity will not interfere with a trustee in the proper discharge of the duties of his trust."

It is claimed that said trustee only acquired the equity of redemption as to the lands conveyed to him in the trust deed. It, however, empowered him to redeem and obtain releases, and to settle up the entire business of the grantor, and directed him, after retaining his commission, to pay the residue to said grantor. The decree dissolving the injunction directed that, should any sale of Sandusky's real estate be made by said Faris, trustee, he should retain the proceeds thereof until the further order of the court. My conclusion, therefore, is that there is no error in said decree to the prejudice of the appellants, and the same is affirmed.

ON REHEARING.

After a consideration of the arguments presented when the cause was originally submitted, as well as those offered on rehearing, I see no cause to change the opinion already handed down, and the decree complained of is affirmed.

Affirmed.

CHARLESTON.

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STATE v. GILLASPIE.

Submitted September 9,1899—Decided December 9, 1899.

SPIRITUOUS LIQUORS—*Minor—Sale—Evidence.*

On trial of indictment for selling spirituous liquors to a minor, it is not error to exclude testimony relative to a written order from the parent of the minor to the dealer, for the liquor, in the absence of such order, and its nonproduction not accounted for. *Query*, would such order, if produced and proved, be a defence to such indictment? (p. 337).

Error to Circuit Court, Tucker County.

C. D. Gillaspie was convicted of selling intoxicating liquors to a minor, and brings error.

Affirmed.

E. D. TALBOTT and GEORGE P. SHIRLEY, for plaintiff in error.

EDGAR P. RUCKER, ATTY. GEN., and W. T. CONLEY, for the State.

MCWHORTER, JUDGE:

C. D. Gillaspie was indicted in the circuit court of Tucker County at the June term, 1898, for violation of the revenue laws of the State, by unlawfully selling and giving to one Pete Currance, a minor, spirituous liquors, wine, porter, ale, beer, and other intoxicating drink. On the 11th of May, 1899, a jury was impaneled to try the plea of not guilty, upon which issue was joined, and, after hearing the evidence, returned a verdict of guilty. The defendant moved the court to set aside the verdict, and award him a new trial, of which motion the court took time to consider, and on the 16th of March the court overruled the motion, and entered up judgment against the defendant for twenty-five dollars fine and the costs. The defendant tendered

two bills of exceptions, numbered, respectively, one and two, which were signed, sealed, and saved to him. The defendant obtained a writ of error, and assigns, first, as error that the court struck out, on motion of the prosecuting attorney, the evidence as set forth in his first bill of exceptions. Pete Currance was the only witness for the State, and on cross-examination he was asked if he did not get the whisky at the saloon with a written order, and for his father. He answered that he did. "Q. Didn't get it for yourself? A. Well, my father sent me for it. Q. Give you a written order to get it? A. Yes, sir." And also the following evidence of A. Currance, witness for the defense: "Q. Do you remember some time about last April—April, 1898, I mean—of having sent your son Pete to Gillaspie's saloon after liquor? A. Yes, sir. Q. State to the jury whether or not you gave a written order. A. I gave the boy a written order for one-half pint of liquor to Gillaspie's saloon some time during the time his saloon was there. I can't state the time. About that time,"—all of which evidence was stricken out. It was not error to exclude this testimony, on motion of the State, because the written order was the best evidence, and its non-production was not accounted for. *McAfee* v. *State*, 85 Ga. 438, (11 S. E. 810); 1 Greenl. Ev. 126. On the matter of the written order, Pete Currance was the witness of the defendant. He had not been examined in chief on that question, and it was not attempted by the defendant to show that he ever gave the order to the barkeeper, or even intimated to him that he had it, nor was it shown that the boy took the whisky to his father or that his father ever saw it. When asked, on cross-examination, "Didn't get it for yourself?" his answer was evasive. He says, "Well, my father sent me for it." The father is put on the stand by the defendant, and he fails to prove that the whisky was taken to him by the boy. It is evidently a mere subterfuge to shield the saloon keeper.

Query, if it had been well proven that the parent had given a written order, which was delivered to the barkeeper when the boy got the whisky, would it be a good defense, in view of the fact that under section 3, chapter

99, Acts 1872-73, it was made unlawful to sell to a minor intoxicating liquors, unless upon the written order of their parents, guardians, or family physicians? By chapter 107 of the Acts of 1877, said section 3 was repealed; yet by section 12 of that chapter it was made unlawful to sell to minors without making the provision that it might be done on the written order of parents, guardians, or family physicians, and the same provision remains in section 16, chapter 32, Code 1891. What was the object of the lawmakers in repealing and leaving out the permission to sell to minors on such written orders?

The point made in the second bill of exceptions is that the court erred in refusing to set aside the verdict, and grant him a new trial, upon the ground that the verdict is contrary to law, and upon the ground that the court improperly excluded the evidence as set out in the first bill of exceptions; and it is argued that the judgment ought to be reversed because, while it is alleged in the indictment that defendant had a state license to sell spirituous liquors, etc., the State had failed to prove the fact. And this is true, so far as shown by the printed record; but, upon notice to counsel for defendant in this Court, the record was corrected and supplied, showing from the official stenographer's notes, verified by him under oath, and certified by the clerk under the seal of the court, that upon the trial of the case the following colloquy occurred: "Mr. Conley, Prosecuting Attorney: Gentlemen, do you admit that the defendant, Mr. Gillaspie, had a State license to sell spirituous liquors during the time covered by the indictment, or shall I introduce record proof of the fact that he had such license? Mr. Maxwell, Counsel for the Defendant, Gillaspie: You need not introduce such proof. We admit that he had such license during the time referred to." This was a distinct and clear waiver of proof on that point. There is no error in the judgment, and it must be affirmed.

Affirmed.

CHARLESTON.

WALLACE'S ADM'X v. LIPPS' ADM'R *et al.*

Submitted June 23, 1899—Decided December 9, 1899.

1. NOTE—*Endorsers—Payment—Usury—Defense.*
Where a party becomes an accommodation indorser on a negotiable note discounted by the maker at a bank at a greater rate of interest than 6 per cent., and such maker executes a deed of trust upon his real estate to secure indemnity, and save harmless such indorser, who afterwards pays off and takes up said note, including its illegal interest, and a party holding a judgment lien against the lands of said maker files his bill to subject said lands to sale to satisfy the liens thereon, said maker may successfully interpose the plea of usury to the claim of such indorser as to the excess of interest paid to the bank and claimed by him. (p. 342).

2. NOTICE—*Usury—Payment—Defense.*
If an indorser have knowledge of the urusy, and voluntarily pay it, he cannot afterwards recover it of his principal, if the latter relies on the plea of usury. (p. 342).

Appeal from Circuit Court, Greenbrier County.

Bill by R. B. Wallace against John Lipps, O. P. Sydenstricker, and others. Plaintiff and Lipps and Sydenstricker having died, their administrators were substituted. Decree for complainant, and defendants appeal.

Affirmed.

PRESTON & WALLACE, for appellants.

GILMER & GILMER and L. J. WILLIAMS, for appellees.

ENGLISH, JUDGE:

On the first Monday in October, 1896, Wallace filed his bill in equity against John Lipps and others, including the lien creditors of said Lipps, seeking thereby to subject to sale the real estate of Lipps to satisfy a judgment in plaintiff's favor against said John Lipps and Henry Lipps for the sum of one thousand five hundred and twelve dollars and

thirteen cents, with interest from April 20, 1892, until paid, and sixteen dollars and eighty-five cents, subject to a credit of eight hundred dollars as of December 1, 1892; praying that all the lien creditors of John Lipps might be convened, and the amount and priority of the liens ascertained, and proper accounts taken. The plaintiff and the defendants O. P. Sydenstricker and John Lipps having died, and their deaths having been suggested, the cause was revived in the name of their respective representatives. The administratrix of the plaintiff filed an amended bill, asking that the cause be revived against the heirs at law of said Lipps, and be proceeded in. J. W. Lipps demurred to the bill, and filed his answer, in which he interposed the plea of usury to certain claims asserted by his co-defendants, Alex F. Mathews, H. A. Holt, John A. Preston, F. W. McClung, B. F. Harlow, and O. P. Sydenstricker, which originated from the fact that they had become his accommodation indorsers on various notes, payable in the Bank of Lewisburg, and had been compelled to pay the same. The cause was referred to a commissioner to ascertain and report the real estate owned by said Lipps, the value and rental value thereof, the liens thereon, their amounts, and priorities. In pursuance of reference, the commissioner proceeded to report the real estate owned by Lipps, and, among other liens, ascertained that on March 21, 1895, a deed of trust was executed on one hundred and seventy-three acres of land therein described, and upon two lots in Lewisburg, to secure the following indorsers on certain notes, and on any renewals that might be made of the same, to-wit: O. P. Sydenstricker on four notes drawn by said Lipps, and payable at the Bank of Lewisburg, one for three hundred and seventy-five dollars, dated February 5, 1895, and due June 2, 1895; one for two hundred and seventy-five dollars, dated January 23, and due May 19, 1895; one for four hundred and thirty-five dollars, dated February 16, 1895, due May 17, 1895; and one for six hundred dollars, dated March 9, 1895, due June 7, 1895. H. A. Holt as indorser upon a note for two hundred and fifty dollars, drawn by said Lipps, dated February 6, 1895, due June 2, 1895. T. W. McClung and John A. Preston as joint indorsers on a note drawn by said Lipps for two hun-

dred and twenty dollars, dated February 21, 1895, and due June 16, 1895. O. P. Sydenstricker and B. F. Harlow as joint indorsers upon three notes drawn by Lipps, one for four hundred and seventy-five dollars, dated February 6, 1895, due May 7, 1895; one for five hundred and fifty dollars, dated February 18, 1895, due May 19, 1895; one for three hundred and seventy-five dollars, dated December 3, 1895, due April 1, 1895,—all of which notes were payable at the Bank of Lewisburg, and on all of them the plea of usury was sustained by the commissioner, and his action confirmed by the court, over the exceptions of said indorsers. The court, by its decree, directed the sale of real estate of said Lipps, and that the proceeds be applied in pursuance of the findings of said report. From this decree, said indorsers obtained this appeal.

The appellants rely on the fact that the defendant Lipps, on March 21, 1895, executed a deed of trust on a portion of his real estate to indemnify and save them harmless as indorsers on said notes, and that they had paid in full the notes indorsed by them, respectively, after the execution of said deed of trust. Now, our statute (Code, c. 96, § 5) provides that "all contracts and assurances made directly or indirectly for the loan or forbearance of money or other thing at a greater rate of interest than six per cent. except where such greater rate is now allowed by law, shall be void as to any excess of interest agreed to be paid above that rate and no further." The amounts paid by these indorsers were paid voluntarily. The notes, so far as they called for interest in excess of six per cent., were void under the statute and could not have been enforced either against Lipps or said indorsers. Either of them could have defeated the collection of such excess by pleading usury, but they elected to pay the same, and now seek to recover it from the estate of Lipps. The law requires the personal representative to protect his estate by relying upon the plea of usury, which has been done in this case. Does the fact that said deed of trust was executed by Lipps, who conveyed the land "in trust to secure indemnity and save harmless" said indorsers upon the notes therein described, or the renewals of the same, in whole or in part, entitle said indorsers to recover, out of the pro-

ceeds arising from said trust property, the excess of interest over six per cent. paid by them to the Bank of Lewisburg? If this was allowed to be done, there is nothing to prevent the officers of the bank, when making a loan of this character, from requiring the indorsers to secure themselves by deed of trust on the real estate of the party making the paper, and then collecting the excess from the indorsers at maturity of the note, and allowing them to reimburse themselves out of the proceeds of their trust, and the usury law would be defeated. Mullin, J., in delivering the opinion of the court in *Bullard* v. *Raynor*, 30 N. Y. 197, says: "If the usury laws are to be enforced so as to prevent usury, they must not leave a door open through which the usurer can insert his finger. If an opening is left, he will soon have his whole body through." In *Mims* v. *McDowell*, 4 Ga. 182, it was said: "Where the security to a promissory note was indemnified by a mortgage executed by his principal, and after the note became due the security voluntarily gave his own note to the creditor which was accepted by him in full payment of the joint debt, and the joint note given up to the security, held, that the security might foreclose his mortgage against his principal, and collect from him what was actually due on the note in the hands of the original creditor, and that the principal debtor was entitled to make any defense to the note which he could have made against such original creditor." So, also, in *Whitehead* v. *Peck*, 1 Ga. 140, it was held: "If the surety have knowledge of the usury, and voluntarily pay it, he cannot afterwards recover it of his principal." To the same effect, see *Jones* v. *Joyner*, 8 Ga. 562. In view of these authorities, we must hold that the defendant Lipps could successfully interpose the plea of usury to the claims of said indorsers, and thus defeat the excess of interest.

As to Lipps' competency to testify as to the notes indorsed by Sydenstricker after the latter's death, he was certainly competent to state what interest was paid the bank, which he fixes at ten per cent. on the original note, and the same on the renewals thereof. This tends to show what the transaction with the bank was, but he does not even state that Sydenstricker indorsed the notes. In order to identify the notes, counsel, in asking the question,

mentions his name, but nothing is asked as to any transaction or communication directly with him, and I think the testimony was competent.

Was the usury sufficiently proven? The commissioner so found, and the circuit court approved his finding, and I see nothing to cause us to disturb his finding.

It is also assigned as error that the Wallace judgment, being a lien on all the real estate owned by the defendant Lipps, should have been decreed to be paid off out of the fund arising from the sale of the lands other than those embraced in the deed of trust of March 21, 1895, to secure and indemnify said indorsers. This assignment, however, appears to be premature, from the fact that, while the decree directs a sale of the land, it does not direct a distribution of the proceeds, or how the money arising from such sale shall be applied. The decree must be affirmed.

Affirmed.

CHARLESTON.

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HUNTER v. TRUSTEES OF BERKELEY SPRINGS.

Submitted November 1, 1899—Decided December 9, 1899.

BERKELEY SPRINGS – *Bath Keeper—Term of Office.*

Section 5, chapter 202, Acts 1882, in providing that the trustees of Berkeley Springs shall annually elect a bath keeper, who shall continue such until the election of his successor, is merely directory as to the time of such election, and was not intended to render such bath keeper, when elected, independent of such trustees for the annual period of one year, but was intended to place his election and after-continuance in office at their pleasure, for the better promotion of the purposes of their trust. (p. 347).

Application of Charles E. Hunter for a writ of *mandamus*, against the trustees of Berkeley Springs.

Dismissed.

FLICK, WESTENHAVER & NOLL, for petitioner.

FAULKNER, WALKER & WOODS, for respondents.

DENT, PRESIDENT:

Charles E. Hunter prays a writ of *mandamus* to compel the trustees of Berkeley Springs to admit and induct him into the office of bath keeper for said springs, which office is now held by Michael A. Pentony. The respondents appeared, and filed their answers, and entered a motion to quash the alternative writ, and the case was submitted for decision. The facts, as appears from the alternative writ, are as follows, to wit: At a regular meeting of said trustees, held in April, 1897, Michael A. Pentony was elected bath keeper for the period of one year, or until the election of his successor. At the regular meetings in April, 1898, and 1899, no action was taken by the trustees, but said Pentony was allowed to continue in the office. In July, 1899, at a special meeting of the trustees, duly and legally called and held, the relator, Charles E. Hunter, was elected bath keeper from the 1st day of August, 1899. That at an adjourned meeting held on the 12th of July, 1899, the trustees reconsidered the election of the relator, and continued the said Pentony in the office. This last action on the part of the trustees the relator claims was illegal and void, for the reason that he had already been chosen bath keeper, and the trustees had no legal authority to rescind such election, but that he is entitled to hold such office from the 1st day of August, 1899, to the 1st day of August, 1900, or until his successor is elected. The relator insists that section 5, chapter 202, of the Acts of 1882, which is in these words, to wit, "A bath-keeper shall be elected annually by the board, who shall continue such until the election of his successor," fixes an annual term for this officer, and, after he has once been chosen, he is entitled to the office for such period, and thereafter until his successor is elected. This is a very narrow and restricted view to take of this provision, but, admitting it to be correct, is the relator en-

titled to the office? Section 7 of the chapter provides: "That the board of trustees shall meet at least once in every year, the time and place of meeting to be fixed by an order of the board. * * * The first meeting of the board under this act shall be held on the first Tuesday in April, one thousand eight hundred and eighty-two, or as soon thereafter as convenient, and not less than five members shall constitute a quorum at any meeting." Taking these provisions together, it was plainly the intention of the legislature that the bath keeper was to be elected annually, at the regular annual meeting. This the trustees appear to have done in so far as Michael A. Pentony is concerned. He was elected at the regular annual meeting held in April, 1897. The next two annual meetings were permitted to pass without an election, presumptively because the trustees were satisfied to allow Pentony to continue as bath keeper under his original election. Having failed to elect at their regular annual meeting, the relator claims that they had a right to elect at any special meeting thereafter. But this does not follow. On the contrary, their failure to elect at their regular annual meeting, and permitting Pentony to hold over, according to the strict construction insisted on by the relator, he would be entitled to hold the office until the next regular annual meeting of the trustees, for they would be without authority to appoint his successor except in case of a vacancy at a special meeting; in short, that the allowance of the annual meeting to go by without an election is equivalent to the re-election of the incumbent, who holds over by appointment of law. The right to hold over is "held by the same title, or by as high and lawful tenure, after the prescribed term, until the title of a duly elected and qualified successor attaches, as before and during such term," and continues "until a qualified successor has been elected by the same electoral body as that to which the incumbent owes his selection, or which, by the law, is entitled to elect a successor." *State* v. *Harrison*, 113 Ind. 234, (16 N. E. 384); *State* v. *Howe*, 25 Ohio St. 588; *Hubbard* v. *Crawford*, 19 Kan. 570; *Gosman* v. *State*, 106 Ind. 203, (6 N. E. 349); *Ex. parte Lawhorne*, 18 Gratt. 85; *Johnson* v. *Mann*, 77 Va. 265; *State* v. *Jenkins*, 43 Mo. 261. Of course, it is the same

body in this case that holds the special meeting as well as the regular meeting. When the law required them to fix a time and place for the regular annual meeting by order, and also provided for the annual election of bath keeper, it undoubtedly intended that such annual election should take place at such regular annual meeting and at no other time; just as regular elections by the people, the legislature, or other bodies empowered to elect officers at a fixed time and place. If they fail to elect at such time and place, the power to elect is gone until the next regular period of time has elapsed, and the incumbents in office, empowered by law to do so, hold until their successors are elected in accordance with the provisions of law. So that Pentony would be entitled to hold over until his successor is legally elected by the body, and in the manner, and at the time and place, fixed in obedience to law; and the selection of John E. Hunter not being at the regular annual meeting, but at a special meeting called, without regard to a fixed annual time or place, is void. But it seems to me that this section of the statute will bear a more liberal construction, and this is that the direction to the trustees to elect a bath keeper is mandatory, but to do so annually is merely directory, so as to always have a bath keeper in charge, especially during the bathing season of the year, beginning in the spring and ending in the fall. This bath keeper, so elected is to hold his office until his successor is elected. He is not chosen for any given term, but holds his office during good behavior, at the pleasure of the trustees. He is responsible to them, and may be displaced at any time, and have his place filled by another, but in case of vacancy there must be always an annual election. The fact that the legislature did not provide for the removal of such bath keeper for cause, or provide for the filling of casual vacancies, upholds this construction; otherwise, a bath keeper once appointed, competent or incompetent, moral or immoral, present or absent, dead or alive, would be entitled to hold the office for one year, and while he might neglect its duties, yet, like the ancient guardianship, he could not resign until the expiration of his term. The word "annually," if used to fix the tenure of office at one year, makes the clause "until his successor is elected" unnecessary,

for, if a successor is elected at the appointed time every year, the necessity for these words is destroyed. "Until the election of his successor" is equivalent to "at the pleasure of the trustees," which pleasure is to be made known by the election of such successor. Laws prescribing the duties of public officers are usually peremptory or mandatory, while those fixing a time for the performance of such duties are directory. 23 Am. & Eng. Enc. Law, 458. A doubtful provision in a statute should be so construed as to effect the purpose of its enaction. *Id.* 319. The trustees were charged with the duty of superintending and controlling Berkeley Springs and the baths connected therewith for public convenience and health, and clothed with all necessary power to render their trust effective for the purposes for which it was created. To accomplish these ends, they must have at all times an efficient, accommodating bath keeper, acceptable to the traveling public in search of health and relief from bodily afflictions. An obnoxious, inefficient, or inattentive bath keeper could entirely drive away and destroy the patronage of the springs; and, if the trustees had not the power of removal, they would be entirely at his mercy during the term of his office. Thus would the purpose of their creation be entirely at the mercy of their appointee. Such is not a reasonable, but rather an absurd, construction of the provisions involved. The true construction, and the one in harmony with the end to be attained, is that the bath keeper held his position, not for any given term, but at the pleasure of the trustees until the election of his successor. By either construction, the alternative writ must be quashed, and the petition dismissed.

Dismissed.

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CHARLESTON.

HASSINGER *et al. v.* HOLT, JUDGE, *et al.*

Submitted November 2, 1899—Decided December 9, 1899.

1. PROHIBITION—*Writ—Jurisdiction.*

To warrant a court in granting a writ of prohibition, it should clearly appear that the inferior tribunal is actually proceeding, or is about to proceed, in some matter over which it possesses no rightful jurisdiction. (p. 351).

2. BOARD OF EDUCATION—*Duties—Ministerial.*

The duties of a board of education in the management and control of graded schools which have been established in its district are essentially ministerial. (p. 352).

3 PROHIBITION—*Writ—Judicial.*

A writ of prohibition only goes against a judicial tribunal and judicial action, and not that which is merely ministerial. (p. 351).

Application by the board of education of Fairfax district and A. S. Hassinger and others for a writ of prohibition against John H. Holt, judge of the circuit court of Tucker County, and others.

Writ Granted.

CUNNINGHAM & STALLINGS and E. P. DURKIN, for petitioners.

WM. G. CONLEY and E. D. TALBOTT, for respondents.

MCWHORTER, JUDGE:

This is an application by the board of education of Fairfax district, Tucker County, and A. S. Hassinger, president of said board, and J. W. Duncan, claiming to be a commissioner and member of said board, for a writ of prohibition against the Honorable John Homer Holt, judge of the circuit court of Tucker County, the circuit court of said county, S. W. Grogan, and I. N. Post, assuming and claiming to be commissioners and members of said board

of education of Fairfax district, A. E. Michael, J. L. Fortney, J. S. Shaver, Alice Deets, and A. M. Dennison. Petitioners allege that they are aggrieved, molested, hindered, and disturbed in their respective duties as a board of education, and president and commissioner thereof, by a vacation order entered by said Holt, judge, on the 9th day of September, 1899, purporting to be a rule in prohibition against petitioners, as well as against H. W. Freeman, Minnie Chisholm, Pearl Carver, Carrie McKee, and C. C. Moore, which last named are teachers of the graded free school of Thomas, in said Fairfax district, without authority of law, and without jurisdiction conferred or reposed therein by law; that, if said judge of said court has any such color of authority or jurisdiction that may be conferred by law, he has usurped and abused any such jurisdiction that he may have had or taken in the premises in entering said order of September 9, 1899. A copy of said order is filed with the petition, and a writ is sought to be issued by this Court to prohibit the further prosecution in said circuit court of a proceeding in prohibition against petitioners and the teachers named. The petition of S. W. Grogan and I. N. Post for writ of prohibition is exhibited with the petition in this case, from which it appears that said I. N. Post caused to be instituted in said circuit court a *quo warranto* proceeding to oust the petitioner J. W. Duncan from the said office of commissioner of said board of education of said Fairfax district, who had been and was acting as such commissioner with said Hassinger, the president of said board, and the object of the prohibition was to prohibit said J. W. Duncan from acting as a member of said board of education until said *quo warranto*, proceeding against him could be heard and determined; that A. S. Hassinger be prohibited from conspiring and confederating with said Duncan to hinder the teachers appointed by petitioners Grogan and Post, as such board, from teaching the Thomas graded free school; that the teachers named as defendants, appointed by said Hassinger and Duncan, be prohibited from interfering or in any manner molesting the teachers appointed by said Post and Grogan in teaching the said Thomas graded school; and that a rule be issued, returnable at the first day of the next term of

said court, against said Duncan and Hassinger and the teachers named. And on the 9th day of September, 1899, said judge entered a vacation order according to the prayer of said petition, which is the rule in prohibition complained of. Petitioners file with their petition for the writ here a certificate of election by the board of canvassers of Tucker County, showing the election by a very large majority at the general election, November 1898, of J. W. Duncan to the office of commissioner on said board, which is certainly color of title to the office; and it is not disputed but admitted that Hassinger is the legal president of the board. The title to the office of J. W. Duncan is assailed by the proceeding in *quo warranto*. The question is has the said judge or the circuit court jurisdiction to interfere with the regular proceedings of the board by prohibition? In *Supervisors* v. *Wingfield*, 27 Gratt. 329, it is said: "It is a principle of universal application and one which lies at the very foundation of the law of prohibition that the jurisdiction is strictly confined to cases where no other remedy exists; and it is always a sufficient reason for withholding the writ, that the party aggrieved has another and complete remedy at law." It seems to be well settled that "the writ of prohibition will not lie to restrain an inferior court from exercising jurisdiction in a particular case if such court has jurisdiction of cases of that kind." *Haldeman* v. *Davis*, 28 W. Va. 324, in which case JUDGE SNYDER, says: "In order to authorize the writ, the petitioner must clearly show that the inferior tribunal is about to proceed in a matter over which it has no jurisdiction. It will not issue when the facts do not affirmatively make the jurisdiction clear and distinct." *Moss* v. *Barkam*, 94 Va. 12, (26 S. E. 388); *Grigg* v. *Dalsheimer*, 88 Va. 508, (13 S. E. 993); *County Court* v. *Boreman*, 34 W. Va. 362, (12 S. E. 490); *Buskirk* v. *Circuit Court Judge*, 7 W. Va. 91, where it is held that: "Prohibition can only be interposed in a clear case of excess of jurisdiction on the part of some inferior judicial tribunal. When the matter is clearly within the jurisdiction of the inferior court a mere error in the proceedings may be ground of appeal or review, but not of prohibition."

There can be no question about the jurisdiction of the

board of education to establish a graded school, and take charge and control of it, employ teachers, and cause it to be conducted under the provisions of section 26, chapter 45, Code. The real contest in this matter is between the said I. N. Post, who claims to be a properly appointed, qualified member of the board of education, and J. W. Duncan, who claims to be also a member by election by the people, and acting in that capacity, with a *quo warranto* proceeding on the part of Post pending to oust him from the office, and to install the said Post in his stead. The vacation order complained of recites the pendency of the *quo warranto* proceedings, and restrains all the defendants, the said Duncan, Hassinger, and the teachers (naming them), "from doing any and all of the things each of them are required to answer why they should not be prohibited from doing, until the further order of the court herein." The effect of this order is to suspend, as illegal, the board as constituted by its president, Hassinger, and Commissioner Duncan, from the exercise of its functions as a body, and to remove or suspend the teachers in the Thomas graded school, and to legalize temporarily the board as composed of the two commissoners, Post and Grogan, and the teachers employed by them; virtually deciding the questions involved in the *quo warranto* proceeding on the application for prohibition. It appears from the vacation order itself that the *quo warranto* proceedings were instituted by said Post himself against Duncan, whereby he admits that Duncan had possession of the office, exercising the functions thereof. "To warrant a court in granting this extraordinary remedy, it should clearly appear that the inferior tribunal is actually proceeding, or is about to proceed, in some matter over which it possesses no rightful jurisdiction." High, Extr. Rem. § 780. In *Norfolk and W. R. Co.* v. *Pinnacle Coal Co.*, 44 W. Va. 574, (30 S. E. 196), 41 L. R. A. 414, it is said in reference to the writ of prohibition: "It always goes against a judicial tribunal and judicial action, and not that which is merely ministerial. A court that usurps jurisdiction only errs, but its error is of such a grievous nature as to call for prompt redress from a supervising tribunal." The effect of the vacation order complained of is to restrain a board of education and set of

teachers in charge of Thomas graded school, and replace them with another board of education and another set of teachers, at least for the time being; and the prohibition thus becomes auxiliary to the *quo warranto* proceeding. The duties of a board of education in conducting a graded school already established are purely ministerial. The writ should issue.

Writ Granted.

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CHARLESTON.

McGEE *et al v.* SAMPSELLE *et al.*

Submitted June 23, 1899—Decided December 9, 1899.

1. DELINQUENT SALE.—*Sheriff's Affidavit—Title.*
The law requires the sheriff to append to his return of delinquent lands a prescribed affidavit. If he omits to do so, and such land is subsequently sold by the sheriff, and by him purchased on behalf of the State, such omission will vitiate the sale, and the State will thereby acquire no title to the land. (p. 356).

2. DELINQUENT SALES—*Statute Construed.*
Where the State becomes the purchaser of land at a delinquent sale, the requirements of the statute with reference to the return and sale of delinquent lands must be complied with before the title to such land becomes vested in the State. (p. 358).

3. STATE—PURCHASER—*Curative—Statute.*
The curative provisions of section 25 of chapter 31 of the Code do not apply where the State becomes a purchaser of land at a delinquent sale. (p. 358).

4. PURCHASER DELINQUENT SALE—*Title.*
When the proceedings for the return and sale of a tract of land as delinquent for the non-payment of taxes are such

as to confer title upon an individual or the State as a purchaser thereof, such purchaser becomes vested with such estate in and to the land so purchased as at the commencement of, or at any time during, the year for which said taxes were assessed, was vested in the party assessed with said taxes. (p. 358).

Appeal from Circuit Court, Mingo County.

Bill by Nancy Brown and William McGhee against L. A. Sampselle and others. Decree for defendants. Plaintiff McGhee appeals.

Reversed.

H. K. SHUMATE and CAMPBELL, HOLT & CAMPBELL, for appellant.

R. H. HOYLE, for appellees.

ENGLISH, JUDGE:

The questions presented for consideration in this case arise out of conflicting claims to the timber on a certain tract of land of two hundred and fifty acres, now situated on the waters of Bens creek, Mingo County, formerly in Logan County. It appears from the record that on the 4th of June, 1888, Enoch Gibson, who then owned one thousand five hundred acres on Bens creek, then in Logan County, sold and conveyed to petitioner William McGhee, one thousand nine hundred and seventy-six poplar trees on said land, which trees were marked with the letter "M," with an ax. The deed for same was recorded June 24, 1888. On December 16, 1889, said Gibson conveyed to Nancy Brown, his daughter, two hundred and fifty acres, a portion of said one thousand five hundred acres, reserving and excepting the marked poplar timber. On the 28th of September, 1895, Nancy Brown and her husband sold and conveyed to said William McGhee three hundred and twelve yellow poplar, cucumber, and ash trees, and seven hundred and seventy-three oaks, standing on said two hundred and fifty acre tract, also marked with an "M," which deed was recorded November 28, 1895. This two hundred and fifty acre tract was returned delinquent for alleged non-payment of taxes for the year 1891 in Logan County. Subsequently the sheriff undertook to advertise and sell

this tract for taxes. And on November 19, 1895, a suit was instituted in the name of the State of West Virginia in the circuit court of Mingo County against said Nancy Brown and many others, not including McGhee, the process in which suit was made returnable to December rules, was served upon some of the defendants, and returned "Not found" as to Nancy Brown. At the December rules, 1895, the bill was filed, embracing different tracts of land and many defendants, including Nancy Brown. The bill prayed for the sale of the land, alleging that it had been properly returned delinquent; that it had been sold and bought in by the sheriff for the State; that the land had been certified by the auditor to the commissioner of school lands, and by him reported to the circuit court as liable to sale under the provisions of chapter 105 of the Code; and that by reason of said sale and purchase the title had become absolutely forfeited and completely vested in the state, and the same had not been redeemed or released from said forfeiture, and was liable to be sold for the benefit of the school fund. On January 18, 1896, the cause was referred to a commissioner, who reported that the Nancy Brown tract had by reason of the sale and purchase thereof become vested in the state for the benefit of the school fund. On September 23, 1896, a decree was entered confirming the commissioner's report, finding forty-four dollars and eighteen cents taxes and interest against the Nancy Brown tract, and decreeing it and many other tracts to be sold for the school fund. In pursuance of this decree the tract was advertised and sold on the 21st of January, 1897, to the appellee, L. A. Sampselle, trustee, who paid the taxes and interest due the state, which sale was afterwards confirmed, and a deed directed to be made to the purchaser. The return on the original summons being "Not found" as to Nancy Brown, the state obtained permission from the court for the sheriff to amend his return so as to show service upon her. On the 15th of May, 1897, the said Nancy Brown and William McGhee appeared in the cause and filed their joint petition, alleging the conveyance to Nancy Brown of the two hundred and fifty acres by deed dated December 16, 1889, and that McGhee owned the three hundred and twelve poplar and seven hun-

dred and seventy-three oak trees standing on said land, and filed the deeds for same as exhibits. The petition also alleged irregularities in the delinquent list and tax sale as to the Brown tract; that Nancy Brown was not served with process, and McGhee was not made a party defendant in the original suit; the sale and purchase by Sampselle,—and prayed for process against Sampselle, Hoyle, and Hatfield to answer the petition, and that the decree of sale, the sale, and decree confirming same, be set aside, and for general relief. The appellees appeared, waived service of process, and objected to the filing of the petition, which objection was overruled. Said appellees also moved to strike out said petition, and filed their joint demurrer to the same, which motion and demurrer were overruled; and thereupon they filed their joint answer denying the material allegations of the petitions, and the petitioners replied generally. Depositions were taken, and two amended petitions filed, both of which were objected to, and the objection overruled, in each case. They also moved to strike out and demurred to said amended petitions, which motions and demurrers were overruled; and on January 19, 1898, on motion of said Nancy Brown, each and all of said petitions and the entire proceedings were dismissed as to her, and the court, proceeding to determine the cause as to McGhee, decreed that he was not entitled to the relief prayed for in his petition, and dismissed the same at his costs. The act of Nancy Brown in dismissing her petitions, and the proceedings thereunder as to her, leave the said McGhee as the sole appellant.

The first error assigned by him claimed that the court should have set aside the deed to Sampselle, trustee, the sale and confirmation, and the decree of sale, as clouds upon the title of petitioner to the timber aforesaid, and it erred in not so decreeing. In considering this assignment of error, I call attention first to the fact that on the face of the deed from Enoch Gibson and wife to Nancy Brown, filed as Exhibit 1 with the petition of Nancy Brown and W. McGhee, there is an exception of all the marked timber (poplar) from 26 inches up, and all the walnut timber and all the mineral rights (as evidently intended by "miner rights"). Now, it appears from the record in this case

that the sheriff of Logan County made an attempt, under the provisions of section 18 of chapter 30 of the Code, to return said two hundred and fifty acre tract delinquent for the nonpayment of taxes thereon for the year 1891. That section requires that the sheriff or collector shall, on or before the first Monday in June next succeeding the year for which such taxes were assessed, make alphabetical lists, by districts, of three classes; also, "A list of other real estate which is delinquent for the nonpayment of taxes thereon, which shall be in the same form and with the same oath made and subscribed as in the above first mentioned list." Said sheriff, in this case, in attempting to make out and return his delinquent list, utterly failed to do so within the time and manner prescribed by statute, in that he failed within that time to make and subscribe the oath prescribed by statute, and append the same to said list. On this point this Court held in the case of *Jackson* v. *Kittle*, 34 W. Va. 207, (12 S. E 484), as follows: "The law requires the sheriff to append to his return of sales of delinquent lands a prescribed affidavit. If he omit to do so, or omit from such affidavit a material or substantial portion of it as so prescribed, the clerk should not make the purchaser a deed, and if the objection is interposed before the deed is made the sale should be set aside." It is true that when the State becomes the purchaser at a delinquent sale no deed is made to it, but section 31 of chapter 31 of the Code provides for the purchase by the sheriff of delinquent lands on behalf of the State, and a return of a list of the lands so sold by him for the State, and, among other things, provides that the officer making out the list shall make oath that it contains a true account of all the real estate within his county purchased by him for the State during the year, and return the list, with a certificate of the oath attached, to the clerk of the county court within ten days after such sale, who shall within twenty days after such sale record the same in a well-bound book, and transmit the original to the auditor. Section 32 of the same chapter provides that "the auditor shall cause all the lists received in his office under the preceding section to be recorded in a well-bound book, and all such estate, right, title and interest in the real estate men-

tioned in such lists as would have vested in an individual purchaser thereof at such sale, who had obtained proper deeds therefor and caused them to be admitted to record in the proper office, shall be by the sale and the purchase on behalf of the state vested in the State, without any deed or other conveyance therefor to the State." This result, however, does not follow unless the land has been returned delinquent, sold, and purchased by the sheriff for the State in the manner prescribed by statute, and all the material requirements in reference to the return of the delinquent list and return of the sales made by the sheriff or other officer have been in the time prescribed by law, and have been recorded by the clerk of the county court and by the auditor as required by statute. To show the importance of these returns being made in the time fixed by statute, this Court held in *McCallister* v. *Cottrille*, 24 W. Va. 173, that "it is the official duty of the clerk of the county court to note in his office the day on which the sheriff returned his list of the sale of lands sold for delinquent taxes, and if he fail to make such note or his office shows that such list was not returned and filed therein for more than ten days after the completion of such sales, this, in either case, is such an omission and irregularity as materially to prejudice the rights of the owner of land sold at such sale, and therefore vitiates any deed made to a purchaser of the land by said clerk, or a commissioner appointed for that purpose." Now, then, if the failure of the officer to make his return of the delinquent sales within ten days required by statute must be regarded as such an omission and irregularity as will vitiate any deed made by the clerk in pursuance thereof, how much more should the fact, apparent from the records of the county court in this case, that the delinquent list, which should have been returned before the first Monday in June, 1892, was returned to the clerk's office without any affidavit appended, and that thesame list was afterwards returned with affidavit appended bearing the date of 4th of July, 1892,—a date long subsequent to the time such return could have been properly made under the statute! But if this land had been regularly and properly returned delinquent, and sold, the State would only have acquired such title as Nancy Brown had.

Under the ruling of this Court in the case of *Summers* v. *Kanawha Co.*, 26 W. Va. 159, it was held that "the purchaser of land sold for taxes, who has obtained his tax deed therefor, and had the same duly recorded in the proper county, becomes invested with such estate in and to the land so purchased by him as at the commencement of, or at any time during, the year for which said taxes were assessed, was vested in the party assessed with said taxes."

It appears from the testimony that one thousand nine hundred and seventy-six poplar trees were purchased by the appellant from Enoch Gibson in 1887-89; that he took a deed for same, and had it recorded, and paid taxes on the trees; and that the two hundred and fifty acre tracts sought to be sold as delinquent was conveyed to Nancy Brown by her father, Enoch Gibson, and on the face of the deed he expressly excepted all of the marked poplar timber from twenty-six inches up, and all of the walnut timber. So she never had any title to the marked poplar timber over twenty-six inches, nor the walnut timber on the tract when it was attempted to be returned delinquent in 1891. In order that the State should acquire the title which was vested in the party in whose name the land was assessed at the time it was returned delinquent, all of the material requirements of the statute in regard to the return and sale of delinquent land must be complied with. See *Twiggs* v. *Chevallie*, 4 W. Va. 463, (Syl., point 2). The curative provisions of section 25 of chapter 31 of the Code do not apply where delinquent lands are purchased by the sheriff on behalf of the State, and, if they did, the omission to append the affidavit required by statute to the delinquent list, and have the same properly recorded by the clerk, is such an error as renders the subsequent proceedings a nullity. My conclusion is that the State acquired no title to said tract of land, or the timber standing on it, by reason of said sale; that the court erred in dismissing appellant's petition; and the decree complained of is reversed, and the cause is remanded.

BRANNON, JUDGE:

While agreeing to the decision, I cannot at present see why the curative provisions for deeds to the individual

purchasers do not apply to the State, though I have not thoroughly examined the matter. The State does not guaranty the action of her officers.

ON REHEARING.

ENGLISH, JUDGE:

After a careful consideration of the arguments presented both at the time the cause was originally heard and upon rehearing, I am unable to reach a different conclusion from that arrived at in the foregoing opinion, which contains the reasons upon which it is based. In addition thereto, however, it may not be improper to call attention to the fact that this two hundred and fifty acre tract was returned delinquent in the name of Nancy Brown, and, if the procedings were of the most regular character, the state could have thereby acquired only such interest in the land as Nancy Brown possessed; and unless a perfect title was acquired by the State the subsequent procedure by the school commissioner could confer no more title than belonged to Nancy Brown at the date of the sale. The record shows that the marked poplar timber from twenty-six inches up, and all of the walnut timber, on said two hundred and fifty acre tract never belonged to Nancy Brown, because, the same was expressly reserved on the face of said deed by which she acquired title from her father, and that she sold and conveyed to McGhee three hundred and twelve yellow poplar, cucumber, and ash trees, twenty-two inches in diameter and upwards, marked "M," and seven hundred and seventy-three oak trees then growing on said land, by her deed of September 28, 1895, which made said McGhee a complete purchaser of said timber long before the institution of this suit on November 19th following, and although said deed was not recorded until the 28th of November, 1895, McGhee was not a *pendente lite* purchaser. This tract was returned as delinquent in the name of Nancy Brown, and as a consequence such title as she had was sold, and purchased by the sheriff for the State. No return was made as to McGhee's interest, and fo course no sale of same was made; and, unless his timber was sold, the State, as a purchaser, could not acquire

the ownership of same. The commissioner of school lands could only sell such interest as was purchased by the State, and that was Nancy Brown's title, and not the timber on the land which was reserved in the deed from her father, and which she had sold to McGhee.

It is claimed, this being a judicial proceeding, and the decree of sale having been executed and the sale confirmed, that, even if the decree be set aside, the purchaser's title should not be affected, under section 8 of chapter 132 of the Code. This, however, has reference to a decree of confirmation, where proper parties are before the court. See *Underwood's Ex'r* v. *Pack*, 23 W. Va. 704; *Hughes* v. *Hamilton*, 19 W. Va. 368; *Capehart's Ex'r* v. *Dowery*, 10 W. Va. 131. If the commissioner of school lands had examined the title of Nancy Brown which he proposed to sell, he would have seen on the face of her recorded deed an exception of a large portion of valuable timber thereon. As above stated, the deed from Nancy Brown to McGhee was executed on September 28, 1895, and admitted to record on November 19th following. The decree directing the sale of said tract was not rendered until September 23, 1896, and the decree confirming the sale bears date January 23, 1897. The purchase of this tract by Hoyle and Sampselle was made between these dates, long after the recordation of McGhee's deed; and, this being a judicial sale, the doctrine *caveat emptor* applies. See Ror. Jud. Sales, § 476, where it is said, "The rule *caveat emptor* applies in all its rigor to judicial sales." See, also, *Id.* § 174. These purchasers had constructive notice of McGhee's title to the timber described in his deed, and they also had like notice of the fact that Nancy Brown never owned the timber excepted from her deed. These considerations would apply if the proceedings by the sheriff to sell said tract were regular and proper, and vested title thereto in the State; but as we have held in the opinion handed down, and which I now adopt, said proceedings were irregular and not such as confer title on the State, either to the land or the timber standing thereon. As before, I conclude that the court erred in dismissing the appellant's petition, and the decree complained of is reversed, and the cause remanded.

Reversed.

CHARLESTON.

47 361
147 464

MERCHANTS & CO v. WHITESCARVER *et al.*

47 361
52 513
52 514
52 586

CALDWELL & PETERSON MFG. CO. v. SAME.

Submitted June 24, 1899—Decided December 9, 1899.

1. INSOLVENT SALE—*Creditor—Bona Fides.*

A mercantile firm, although indebted to insolvency, may sell its stock of merchandise to a disinterested party, and receive his notes in payment therefor, payable to its order, and assign one or more of said notes in payment of a debt owed by it to a *bona fide* creditor; and such transfer will not be void, under section 2 of chapter 74 of the Code, as amended by chapter 4 of the Acts of 1895. (p. 366-367).

2. PURCHASER—*Note—Prior Debt.*

Such purchaser may also, as a part of the purchase money, make a note payable directly to a bank that holds the note of said firm for a *bona fide* pre-existing debt, and substitute such not for the note of said firm held by the bank. (p. 366).

Appeals from Circuit Court, Upshur County.

Bills by Merchant & Co. against Whitescarver & Brake and others, and by the Caldwell & Peterson Manufacturing Company against the same defendants. From the decrees rendered, the plaintiffs and others appeal.

Affirmed.

C. C. HIGGINBOTHAM, for appellants.

G. M. FLEMING and W. H. FISHER, for appellees.

ENGLISH, JUDGE:

George H. Whitescarver and Loomis Brake, under the firm name of Whitescarver & Brake, engaged in the hardware business in the town of Buckhannon, West Virginia, became insolvent and indebted to a number of firms and individuals. On the 23rd of July, 1895, said firm sold its stock of hardware to C. W. McCormick for two thousand three hundred and eighty-eight dollars and sixty cents, no part of which purchase money was paid in cash, but Mc-

Cormick executed therefor four notes,—one for five hundred dollars, dated July 23, 1895, payable two years after date, to the order of Whitescarver & Brake, with interest from date, signed by said McCormick and J. E. Newlon, which note was indorsed by Whitescarver & Brake, and delivered to T. J. Farnsworth in satisfaction of a note for five hundred dollars, then due, held by Farnsworth against said firm, on which Hyre Brake was surety; another for five hundred dollars, payable to the Buckhannon Bank in four months, executed by McCormick, J. E. Newlon and W. H. Fisher, was accepted from said firm in lieu and satisfaction of a note for five hundred dollars, held by it against said firm, and signed by Hyre Brake as surety. The First Natonal Bank of Grafton also held a note for seven hundred and fifty dollars, with interest thereon from August 2, 1895, executed by G. H. Whitescarver, Loomis Brake, G. M. Whitescarver, and J. T. Whitescarver, and, as part of said purchase money, on July 24, 1895, C. W. McCormick executed a note to said National Bank of Grafton for seven hundred and fifty dollars, with J. E. Newlon and Sarah McCormick as sureties, and with it took up said Whitescarver & Brake note held by said bank. On August 16, 1895, said firm conveyed to W. S. O'Brien all of its claims, open accounts, and choses in action to secure the creditors of said firm *pro rata*. Merchant & Co., a corporation, filed its bill in the circuit court of Upshur County, claiming that it had a judgment against said firm for fifty-nine dollars and eighty-three cents, dated August 13, 1895; alleged the above facts in regard to the sale of said goods by Whitescarver & Brake to McCormick, and the transfer of the notes received therefor; stated the names of other parties who had obtained judgments against said firm, and the amounts; and mentioned, also, the transfer by the firm of its notes and accounts, many of them worthless, to W. S. O'Brien, trustee; and prayed that the Buchkannon Bank and Thomas J. Farnsworth might be required to refund the money received by them, and the same be applied *pro rata* to debts of said firm. Merchant & Co. also filed an amended bill, alleging additional facts, mentioning other judgments that had been obtained against said firm, and prayed that the

Buckhannon Bank, said Farnsworth, the Upshur County Building and Loan Association, and the First National Bank of Grafton be required to deliver up the money received by them, and the same applied *pro rata* to the debts of such of the creditors of said firm who might come in and contribute to the expense and cost of the suit. The Caldwell & Peterson Company, a corporation, also filed its bill, claiming and describing a judgment obtained by it against said firm, alleging the same to be insolvent; that it was collecting its debts, and not applying the proceeds to the payment thereof; and prayed that said firm be enjoined from assigning or collecting any of its assets, or disposing of its estate, real or personal; and that a receiver might be appointed to take charge of said estate, collect the assets, dispose of the property, and apply the proceeds *pro rata* to the firm's said debts. On August 17th an injunction was granted, and on the 31st a receiver appointed. Numerous answers and petitions were filed, setting up judgments and claims against said firm, which also filed its answer to the bill of the Caldwell & Peterson Company, denying the material allegations thereof. These causes were heard together, and a reference was made to a commissioner, who was directed to ascertain and report all the property of every description owned by said firm at the time their stock of goods was sold to McCormick, and what disposition was made of said property, as well as all debts owing at the time of said sale. Said commissioner, among other things, reported the debts above mentioned as owed by said firm to T. J. Farnsworth, the Buckhannon Bank, and the First National Bank of Grafton, and the facts above stated as to the notes which had been accepted by said creditors in lieu thereof; but found that the note for five hundred dollars executed by C. W. McCormick, etc., to Whitescarver & Brake, and assigned to T. J. Farnsworth, the note executed by same to the Buckhannon Bank for five hundred dollars, the note by the same to the First National Bank of Grafton for seven hundred and fifty dollars, and said note executed by same to Whitescarver & Brake, and assigned by them to G. M. Whitescarver, amounted, in the aggregate, to two thousand three hundred and eighty-eight dollars, and that they

were executed by said McCormick in payment for said stock of goods, and were unpaid; which finding was excepted to by the Buckhannon Bank. Merchant & Co. also excepted to said report, because they were entitled to priority of payment out of the two thousand six hundred and fifty-five dollars and fifty-two cents reported as due by said McCormick to said firm over all defendants who failed to file answers requesting to contribute to the payment of costs. The Buckhannon Bank also excepted particularly as to the five hundred dollars represented by the note of McCormick executed to said bank, and accepted as payment of a note for a like amount executed to said bank by said firm and Hyre Brake, and to the reporting of a debt of five hundred dollars and interest against said firm in favor of said bank as a common creditor of said firm, the transaction between the two having been closed by the payment to said bank of McCormick's note for five hundred dollars, with J. E. Newlon and W. H. Fisher as sureties, without fraud or knowledge of insolvency of the debtors on the part of the bank; it not having been a party to the sale of said stock of hardware to said McCormick. The defendant Farnsworth also excepted to said report, so far as it included in the assets of said firm the two thousand three hundred and eighty-eight dollars and sixty cents paid by McCormick for said stock of goods, and particularly the five hundred dollars represented by the note for that amount executed to said firm by McCormick and J. E. Newlon, and assigned by said firm to him, and accepted in settlement of their note for like amount, on which Hyre Brake was surety, and to the reporting of a debt of five hundred dollars and interest against said firm in favor of said Farnsworth as a common creditor of said firm; it having paid its debt to him by the assignment of said McCormick note, on which said Newlon was surety. The First National Bank of Grafton also excepted to so much of said report as affected its interest, and made it liable to refund the seven hundred and fifty dollars which G. H. Whitescarver, J. T. Whitescarver, and G. M. Whitescarver owed said bank, because their debt was a straight loan, not to the firm of Whitescarver & Brake, which was unknown to said bank, but to G. H. Whitescarver and others,

which was paid out of the proceeds of a straight loan to C. W. McCormick, with J. E. Newlon and Sarah McCormick, sureties, and, if any arrangements were made between McCormick and the late firm of Whitescarver & Brake, by which said note was to be paid from the sale of said stock of goods, said Brake was not a party thereto, and not bound thereby, and not, therefore, in any way liable to be required to refund any money paid to it in discharge of said note. The court, by its decree, sustained the above exceptions filed by said two banks and T. J. Farnsworth, and overruled all the other exceptions thereto, subject to certain modifications made by said decree, and confirmed said commissioner's report; and Merchant & Co., Caldwell & Peterson Company, and several other creditors obtained this appeal, claiming, first, that the court erred in sustaining the above-named exceptions to the commissioner's report filed by said two banks and Farnsworth, and in dismissing plaintiff's original bill as to said banks, the Upshur County Building and Loan Association, and T. J. Farnsworth.

Did the court err in sustaining these exceptions? Can we say the creditors of the firm of Whitescarver & Brake are entitled to set aside the transactions mentioned in these exceptions, and share *pro rata* in the proceeds arising from the sale of said merchandise to McCormick? Now, while it may be true that said firm was insolvent at the date of the sale, it is equally true that said two banks and Farnsworth were *bona fide* creditors of the firm, and, if the sale to McCormick had been made for cash, the firm could have taken the money and paid off these debts, and neither the plaintiffs nor any other of their creditors could have recovered it. As part of said purchase money, McCormick, in July, 1895, executed a promissory note, with J. E. Newlon as surety, for five hundred dollars, payable two years after date, to the order of Whitescarver & Brake, with interest from date, which note was duly indorsed by said firm to T. J. Farnsworth, who surrendered to the firm its note for five hundred dollars, then due, on which Hyre Brake was surety. It also appears that the Buckhannon Bank held a note for five hundred dollars against the firm, with Hyre Brake as surety, and in payment

thereof said firm gave it a note for five hundred dollars, payable at the bank in four months, executed by McCormick, J. E. Newlon, and W. H. Fisher, and took up the note so held by said bank. It also appears that the First National Bank of Grafton held a note against G. H. Whitescarver, with J. T. and G. M. Whitescarver as his sureties, which was paid August 2, 1895, by said McCormick, for whom said bank discounted a note for seven hundred and fifty dollars, signed by J. E. Newlon and Sarah McCormick, which note is still held by said bank. G. M. Whitescarver was also security for said firm for the sum of six hundred and thirty-eight dollars, and on July 23, 1895, said McCormick executed his note to the firm for six hundred and thirty-eight dollars, and they assigned the same to indemnify him, as their surety, to the Usphur Building and Loan Association. As I read section 2, chapter 74, Code, as amended by chapter 4, Acts 1895, neither of these transactions can be regarded as void, or such as would entitle the general creditors of said firm to a *pro rata* distribution of the proceeds of said sale, when we consider the concluding words of this section 2, which reads as follows: "Provided, further, that nothing in this section contained shall be taken to effect any transfer of bonds, notes, stocks, securities or other evidences of debt in payment of or as collateral security for the payment of a *bona fide*, debt, or to secure any indorser or surety, whether such transfer is made at the time such debt is contracted or indorsement made or for the payment or security of a pre-existing debt." These debts all seem to be *bona fide* and pre-existing, and the evidence shows that G. M. Whitescarver, to whom the six hundred and thirty-eight dollar note was assigned, was the surety of said firm to the building and loan association for that amount, so that these transactions are brought strictly within the exception or proviso contained in the last clause of said section 2. See *Carr* v. *Summerfield*, (recently decided by this Court) 34 S. E. 804 (Syl., point 4.)

So far as appears, the said sale of stock was made by this firm to a disinterested party, who executed his notes in payment for the same, and, while said firm may have been indebted to insolvency, there were no liens upon the

property sold. They had a perfect right to sell and secure said notes in payment for the same, and under said section 2 the firm could transfer said notes in payment of a *bona fide* debt, or to secure any indorser or surety, whether such transfer is made at the time such debt was contracted or for the payment or security of a pre-existing debt. In the case of *Mack* v. *Prince*, 40 W. Va. 328, (21 S. E. 1014), this Court held that "the good intent of the debtor which must be deduced from the circumstances surrounding the transaction, is involved; and if it reasonably appear from the transaction that he was not endeavoring to give the creditor an undue priority or preference over others, but was simply securing a just debt, then the statute would not destroy the security." So, also, in *Johnson* v. *Riley*, 41 W. Va. 146, (23 S. E. 700), DENT, J., delivering the opinion of the Court, says: "But, notwithstanding his insolvency, * * * he may dispose of his property, without infringing the statute, * * * to a *bona fide* innocent purchaser for value;" and there is nothing in this case which placed C. W. McCormick in any other category. There is no question raised as to the *bona fide* of the notes lifted with said McCormick's notes. Looking at the entire case presented, my conclusion is that the decree complained of must be affirmed.

Affirmed.

BRANNON, JUDGE:

I doubt as to the notes made payable to the Buckhannon Bank.

CHARLESTON.

GARDNER'S ADM'R *v.* GARDNER'S HEIRS.

Submitted June 23, 1899—Decided December 9, 1899.

1. COMMISSIONER'S REPORT—*Exception—Appeal.*
   Where an exception is not taken in the court below to a commissioner's report, and the matter objected to might be affected by extrinsic evidence, the appellate court will not consider such objection. (p. 372.)

2. DEBTS—*Priority—Postponement*
   Under section 25, chapter 85, and section 3, chapter 86, Code, it is error for the court to take a debt proved as a general debt against an estate, under the fourth clause of said section 25, out of said class, and postpone it to the payment of the other debts of the same dignity and class. The payment must be of all such debts *pro rata*. (pp. 372, 373.)

Appeal from Circuit Court, Greenbrier County.

Action by M. M. McGrath, administrator of Mary Gardner, against John McDonald and others, heirs of decedent. From the decree, John McDonald appeals.

Modified.

L. J. WILLIAMS, for appellant.

GILMER & GILMER, for appellees.

MCWHORTER, JUDGE:

Mary Gardner died seised of two pieces of real estate situate in the town of Ronceverte. On one of these lots was her dwelling house. They were valued together, on the assessor's books, at the sum of one thousand three hundred and seventy-five dollars. She left no personal property, and the estate was in debt. M. M. McGrath was appointed administrator, and filed his bill in the circuit court of Greenbrier County, against the heirs at law and creditors of the estate, so far as known, praying for the proper accounts to be taken, the dignity and priorities

of the liens and debts ascertained, and sale of the property to pay the debts, and for general relief. Defendant John McDonald filed his answer, alleging that on or about the 5th of February, 1889, he rented rooms in the house owned and occupied by the deceased, Mary Gardner, and moved into same; that from the time he moved into the house with Mary Gardner he furnished means for the payment of taxes, purchase of lumber and material for repair and improvement of said property, including paints, paper, muslin, etc., for papering walls, etc.; that, being a lumberman and carpenter, he did much of the work himself; that he furnished money, or in person paid bills for work, labor, materials furnished, taxes, and insurance, for the use and benefit of Mary Gardner and her estate; that said Mary Gardner was advanced in years, not strong physically; that he and his wife cared for and attended Mrs. Gardner from the time he moved into the house in 1889, until the death of Mrs. Gardner, in May, 1897; that as she grew older she required more waiting on and attention, and for the last two years she was at times quite a charge to defendants' wife, who was attentive, kind and, faithful to her; that, after deducting a fair and reasonable amount for rent from the amounts furnished and expended by him for the use and benefit of Mrs. Gardner, and at her request, she was justly due defendant at her death the sum of one thousand, four hundred and thirty-five dollars and eight cents; that said Gardner left personal estate of very little or no value, but was seised and possessed of a valuable house and lot in the town of Ronceverte, which he was entitled to have sold to satisfy his debt; and united in the prayer of the bill that the property be sold to pay his and other debts. The cause was referred to a commissioner to take, state, and report an account, showing what property, real and personal, said Mary Gardner owned at the time of her death, with location and probable value of the real estate and any other matter to be specially stated deemed pertinent by the commissioner, or required by any party in interest, and that the creditors be convened by notice published and posted as required by law. The commissioner, after giving the notices required, made up and returned his report, classifying the debts against the

estate, placing funeral expenses in class one, taxes in class two, and general claims against the estate in class three. Exceptions by John McDonald appear from the decree to have been taken to said report, but do not appear in the record to show the nature of them. The cause was heard July 6, 1898, and, it appearing that the exceptions to said report were not further insisted on by John McDonald, they were allowed to be withdrawn. "And, there now being no objection to said report of Commissioner Mays, the same, as modified by the court, is hereby confirmed in all things. And it appears from said report that John A. Handley is entitled to recover of the estate of Mary Gardner fifty-two dollars and ninety-one cents, and John Kimberlin is entitled to recover against said estate two dollars and two cents, both of equal dignity, and first-class debts; that the following persons are entitled to recover against said estate as second-class debts of equal dignity, as follows: D. A. Dwyer thirty-eight dollars and twenty-nine cents, S. H. Nickell eighteen dollars and fifteen cents, and the corporation of Ronceverte fifteen dollars and twenty-four cents, and Gilmer & Gilmer, attorneys for the administrator, fifty dollars; and the following persons are entitled to recover against said estate as third-class debts, as follows: C. H. Thompson five dollars and forty-two cents, H. B. Moore nine dollars and twenty-five cents, Greenbrier Meat & Fertilizer Co. five dollars and seventy-one cents, Charles F. Schlipp thirty-three dollars and twenty-six cents, Harrington Bros. fifty-two dollars and ninety-six cents, Patton & Co. one hundred and sixteen dollars and four cents, M. A. Gates one hundred and thirteen dollars and thirty-one cents; and that John McDonald recover against said estate nine hundred and four dollars and ten cents, as fourth-class debt,"—and went on to decree the sale of the real estate to pay such debts, with interest, in the order named. From this decree the defendant John McDonald appealed.

In the petition for appeal it is stated that in making his report the commissioner placed the claim of John McDonald in the third, or general, class, with the debts of like kind; that no one excepted to said report but petitioner, who did so "because the whole of his account was not al-

lowed, and by permission of the court he was allowed to withdraw his exception. This left the report without objection, and the same, as modified by the court, was confirmed in all things. Now, it is on account of this modification that petitioner complains. He assigns as error the modification of the report by taking the debt of McDonald from the third class among the general debts, and postponing it to the fourth class, because it has the same dignity as store accounts, doctor bills, etc., which were in the third class; and, second, that it was error to allow the taxes assessed against Mary Gardner for the years 1895 and 1896 as liens against her real estate, for that the failure of the sheriff to return the land delinquent in the time required by law discharged the land from the payment of said taxes." Section 25, chapter 85, Code, fixes the order in which the personal estate in the hands of the administrator shall be applied to the debts: First, to debts due the United States; secondly, taxes and levies assessed upon the decedent previous to his death; thirdly, debts due as personal representative, guardian, or committee, etc.; fourthly, all other demands ratably, except those in the next class; fifthly, voluntary obligations. And section 3, chapter 86, *Id.*, provides for the payment of decedents' debts out of the proceeds of real estate when sold for that purpose, which are assets in the hands of the administrator in the same order in which personal assets are directed to be applied. It is argued by appellees that one of two things may be inferred from the decree complained of, —either McDonald withdrew his exceptions, and consented to the entering of the decree deferring his debt to the other creditors, or the case was contested, and he was deferred by the court without his consent. McDonald had nothing to complain of in said report except where the commissioner reports as follows: "As to the items amounting to four hundred and seventy-eight dollars and eighty-seven cents in the account claimed by John McDonald, they were not allowed, because there is no evidence in support of this part of said account except the deposition of John McDonald. Therefore said items are stricken from the account." The commissioner had reported the claim of McDonald in the third class, among the general debts, to be "paid rata-

bly," where it belonged, if sufficiently proven,—which it appears to have been to the satisfaction of the commissioner, and also the court.

Appellees assign as error that McDonald was allowed anything in any class; that he was a member of the family of the deceased, Mrs. Gardner, and never expected anything. The items allowed by the commissioner seem to have been proven by the depositions of witnesses not interested, and the commissioner struck out so much of the account as was only supported by the testimony of McDonald. Appellees also claim that the court erred in decreeing anything in favor of Patton & Co., Harrington Bros., and M. A. Gates, or for taxes. The commissioner refers in his report in support of some of these claims to the depositions of witnesses taken before him, which do not appear in the record. "A commissioner's report, made in a cause rightly referred, on the face of which no error appears, will be presumed by the court as admitted to be correct by the parties, not only so far as it settles the principles of the account, but also in regard to the sufficiency of the evidence upon which it is founded, except in so far as to such parts thereof, as may be objected to by proper exceptions taken thereto before the hearing; and the court at the hearing is bound to observe this rule of equity practice." *Ward* v. *Ward*, 21 W. Va. 262; *Chapman* v. *Railroad Co.*, 18 W. Va. 184 (Syl., point 9); *McCarty* v. *Chalfant*, 14 W. Va. 531. "Where an exception is not taken in the court below to a commissioner's report, and the matter objected to might be affected by extrinsic evidence, the appellate court will not consider such objection." *Evans* v. *Shroyer*, 22 W. Va. 581. See, also, *Hyman* v. *Smith*, 10 W. Va. 298. As to the assignment of error in allowing the claim for taxes for the years 1895 and 1896, made by both appellant and appellees, claiming that the taxes had ceased to be a lien under the statute, and, not being levyable, could not be allowed as a claim against the estate, these taxes, under chapter 63, Acts 1897, may be levied and collected any time before the close of the calendar year 1899; hence are a legal and proper claim against the estate. Under section 25, chapter 85, and section 3, chapter 86, Code, it is error for the court to take a debt proved as a general debt against

an estate under the fourth clause of said section 25 out of said class and postpone it to the payment of the other debts of the same dignity and class. The payment of all such debts must be *pro rata*.

For the reasons stated herein, the decree complained of is reversed and set aside in so far only as it takes the claim of McDonald out of the third class, and said decree is amended by confirming said report of Commissioner Mays, which makes the claim of appellant, John McDonald, a part of class three, instead of class four, and to be so paid out of the proceeds of the sale of the real estate when the sale shall be made and confirmed; and in all other respects the decree is affirmed. The appellant, being the party substantially prevailing, is entitled to recover his costs of this appeal, to be paid by the appellees out of the assets of the estate of Mary Gardner; and the cause is remanded for further proceedings to be had therein.

Modified.

CHARLESTON.

COOMBS *v.* SHISLER *et al.*

Submitted September 9, 1899—Decided December 9, 1899.

JURISDICTION—*Law—Equity.*

Equity has no jurisdiction where there is full, complete, and adequate remedy by action at law. (p. 375.)

Appeal from Circuit Court, Monongalia County.

Petition by E. H. Coombs against John E. Shisler and others. Decree for plaintiff, and defendants appeal.

Dismissed.

OKEY JOHNSON and R. E. FAST, for appellants.

GEORGE C. STURGISS, for appellee.

BRANNON, JUDGE:

There was a chancery suit in the circuit court of Monongalia County, brought by Joseph Moreland, as administrator of John H. Hoffman, deceased, against the children and widow of said Hoffman and various of his creditors, for the purpose of convening his creditors, fixing their debts, and subjecting his assets to their payment; and the creditors were convened, and their debts fixed, and their rights as to the assets settled, and the estate administered and wound up by decree therein. This decree was final, as it settled and adjudicated the rights of the parties as to the matters involved in the record. Among the liabilities established by that decree against Hoffman's estate was one for money which went to his hands as general receiver of said court, which was decreed to be paid out of the assets. The bill stated that Hoffman had been such receiver, and specified some of his liabilities as such, and made the sureties in his last official bond defendants, but asked no decree against them. After such final decree, E. H. Coombs, general receiver of said court, filed in said court a pleading calling itself a "petition," and purporting to be a part of said ended cause, the same being filed at rules, without any leave of court. This petition set forth the said suit and proceedings therein, and that in it the said liability of Hoffman as receiver had been fixed at a certain amount, and represented that the parties entitled to the money in Hoffman's hands as receiver were in some instances needy, and clamorous for their money, and that they ought not to be required to await its collection out of the assets of Hoffman, and prayed that William Morehead, George M. John, E. Shisler, and George W. Johnson, sureties in Hoffman's last bond as receiver, be required to discharge said debt, and that Hoffman's estate be required to reimburse them. Said sureties filed their demurrer and answer. The demurrer was overruled, and the result was a decree in favor of Coombs against Johnson and his co-sureties for eight thousand one hundred and twenty-seven dollars and eighty-

one cents, and from this decree they come to this Court by appeal. The demurrer denies jurisdiction in equity. Taking up the demurrer, we find one ground assigned for it is that, as the case in which the petition had been filed had been ended, no petition could be filed in it for the purposes sought in this petition. This seems to me to be correct; but, though this petition calls itself a petition, and purports to be filed in that case, yet I think that jurisdiction in equity could not be denied on this score, but that we should treat the petition as an original bill. No matter about the name. Its claim to be a part of that case is immaterial. We should treat it as pleading the facts shown by that record, and give it force as an original bill on the matters stated in it. Courts of equity are very liberal under this head. *Riggs* v. *Armstrong*, 23 W. Va. 760; *Martin* v. *Smith*, 25 W. Va. 583. But can it be sustained as an original bill? I think not, because an action at law on the receiver's bond will give full and complete relief. The fact that the decree fixed a debt on Hoffman's estate for this money did not limit relief against the sureties to that suit, or authorize a suit in chancery. As there is no jurisdiction, it would be improper to discuss other matters, and no prejudice as to them or any action at law shall come to any of the parties from this decision.

I note a clause in the petition alleging an error in the commissioner's report in the omission of a fund in Hoffman's hands in the suit of Lemon's guardian against Moses Lemon. It is not pleaded as an accident or mistake, but as an omission of the commissioner to report it under the evidence, and the clause asks decree for the debt,—a matter proper for exception in that case as an error of law. No facts and circumstances to make it a mistake relievable in equity are pleaded. No prejudice is to come to that claim from this decision. Decree reversed, and the bill filed by E. H. Coombs, general receiver, calling itself a petition, is dismissed, without prejudice to any action at law.

Dismissed.

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CHARLESTON.

YATES *et al.* v. TAYLOR COUNTY COURT.

Submitted November 1, 1899—Decided January 24, 1900.

1. COUNTY—*Criminal Claims—Actions.*

As a condition precedent to the institution and maintenance of a suit against the county court for any demand for a specified sum of money, founded on contract, except an order on the county treasury, such demand must have been presented to the county court, and have been disallowed by it in whole or in part, unless the court refuses to act on such demand by the close of the first session after that at which it is so presented, or of the second session after it is filed with the clerk, pursuant to section 40, chapter 39, of the Code, for presentation. (page 378.)

2. JURISDICTION—*Consent.*

Consent of parties cannot confer upon a court jurisdiction which the law does not confer, or confers upon some other court, although the parties may by consent submit themselves to the jurisdiction of the court. In other words, consent can not confer jurisdiction of the subject-matter, but it may confer jurisdiction of the person. (p. 379.)

3. COURTS—*Jurisdiction Limited—Record.*

In courts of limited and inferior jurisdiction, the record must show jurisdictional facts. (p. 379.)

4. JUDGMENT—*Liability—Process.*

In order that a valid judgment may be rendered by a justice of the peace, the suit must be brought against a defendant upon whom is the liability, and service of process upon another and different party will not confer jurisdiction of the subject-matter. (p. 379.)

5. JUDGMENT—*Donation Void.*

The judgment of a court ordering or confirming a donation made out of the county treasury without lawful authority is void and will be prohibited. (p. 388).

Application by the Taylor County Court for a writ of prohibition against John H. Holt and Thomas G. Yates.

Writ Granted.

G. H. A. KUNST, for petitioner.
W. R. D. DENT, for respondents.

ENGLISH, JUDGE:

Thomas G. Yates was assigned as counsel by the circuit court of Taylor County to defend one Frank Powell, who was charged with felony; and on the 25th of April 1899, an order was entered by said court by which he was allowed an attorney's fee of twenty-five dollars, and the same was ordered to be certified to the county court for payment. On the 17th of May, 1899, said Yates brought an action before a justice of said county against the county court to recover said claim, in which he alleged he would demand judgment for twenty-five dollars, with interest and costs. The plaintiff, in his complaint, stated that said claim was presented to the county court for payment at its May term, 1899, but does not say that payment thereof was refused. The defendant, in its plea, claimed that the order of the circuit court allowing plaintiff twenty-five dollars for defending Powell was never presented to defendant by its clerk, and that it did not neglect or refuse to act on the order and certificate, and never disallowed plaintiff's claim, in whole or in part, and that the certificate of the circuit court did not bind or authorize it to levy on the taxpayers for the payment of the same. The defendant made no further defense, the plaintiff proved his claim, and judgment was rendered in his favor for the amount claimed, interest and costs. An appeal was taken to the circuit court. On the 23d of September the defendant moved the circuit court to quash the summons, which motion was overruled. The defendant also filed a plea in writing, to which the plaintiff replied generally, and defendant moved the court to reject the plaintiff's account, indorsed, "Lodged in the clerk's office 21st day of September 1899," which motion the court overruled. The case was submitted to a jury, which found a verdict in favor of the plaintiff for twenty-five dollars, and judgment was rendered thereon against the defendant, which thereupon presented a petition to a judge of this Court, praying that a writ of prohibition be awarded it, to prevent said circuit court from further proceeding in said action; and a rule was awarded, returnable to the first day of this term. The respondent

Yates demurred to the petition of the county court, and moved to quash the rule and dismiss the petition.

The question presented for consideration by this record is whether the justice or the circuit court had jurisdiction of the action brought by Yates. Section 41 of chapter 39 of the Code provides that "no suits shall be brought against a county court for any demand for a specified sum of money founded on contract, except an order on the county treasury, until such demand has been presented to such court and has been disallowed by them in whole or in part." See *Chapman* v. *Wayne County Court*, 27 W. Va. 496. In 16 Enc. Pl. & Prac. p. 1132, the law is stated thus: "When the jurisdiction of an inferior court is derived from a statute prescribing the manner of procedure in an action, it may be prevented by the writ of prohibition from departing from the manner prescribed." See *Wilkinson* v. *Hoke*, 39 W. Va. 403, (19 S. E. 520); *West* v. *Ferguson*, 16 Gratt. 270. In *Ex parte Ellyson*, 20 Gratt. 10, it is held: "The writ of prohibition is only a proper proceeding to restrain a judge from exceeding his jurisdiction, and not to correct an erroneous judgment in a case in which he has jurisdiction." See *Buskirk* v. *Judge of Circuit Court*, 7 W. Va. 91. High, in his work on Extraordinary Legal Remedies (section 762), in speaking of the writ of prohibition, says: "The object of the writ being to restrain subordinate judicial tribunals of every kind from exceeding their jurisdiction, its use in all proper cases should be upheld and encouraged, since it is of vital importance to the due administration of justice that every tribunal vested with judicial functions should be confined strictly to the exercise of those powers with which it has by law been intrusted." And in section 764 the author says: "The appropriate function of the remedy is to restrain the exercise of unauthorized judicial or *quasi* judicial power, which is regarded as a contempt of the State or sovereign, and which may result in injury to the State or its citizens." The respondent J. H. Holt, denies that he is proceeding without jurisdiction or authority of law, but, on the contrary, avers, as is shown by the record filed with the petition, that said circuit court took cognizance of said cause at the special instance of the petitioner, who now denies the

jurisdiction of said court, after appealing to it, simply because the decision was adverse. In 12 Enc. Pl. & Prac. p. 126, it is said: "It is accordingly a well-settled and universally applied principle that consent of parties cannot confer upon a court jurisdiction which the law does not confer, or confer upon some other court, although the parties may by consent submit themselves to the jurisdiction of the court. In other words, consent cannot confer jurisdiction of the subject-matter, but it may confer jurisdiction of the person,"—citing numerous authorities. It says also (*Id.* p. 201): "Every presumption is in favor of the regularity of the proceedings of courts of general jurisdiction, even though the record is silent. The foregoing rules generally apply to courts of limited and inferior jurisdiction, the only difference between courts of general and courts of special jurisdiction being that the record of the latter must show jurisdictional facts." See, also, *Galpin v. Page*, 18 Wall. 350, (Syl., point 2, latter clause), 21 L. Ed. 959. The defendant, in its plea filed before the justice, denied that the order of the circuit court allowing plaintiff twenty-five dollars for defending Powell was ever presented by its clerk, or that it neglected or refused to act on the order, and claims that it never disallowed said claim, in whole or in part; and nothing appears in the record to contradict the allegation. The presentation of the claim to the county court, and its refusal to allow the same in whole or in part, having been made a condition precedent to the institution of a suit for the same against said court, and it not appearing affirmatively from the record that there had been such action on the part of the county court, we must hold that neither the justice nor the circuit court had jurisdiction to hear and determine this case.

In order that a valid judgment may be rendered by a court, whether of limited or general jurisdiction, the suit must be brought against the party upon whom the liability rests. In other words, where A. owes a debt, a suit brought against B., and process served upon him, will not authorize the rendition of a judgment against B. for the debt of A. Now, unless this twenty-five dollars was a debt of the county of Taylor, suit brought against said county, and process served on it, would not give the court

jurisdiction to render judgment on the claim. Was the county in any manner liable? We find no statute fixing the liability for its payment upon the county, and, when we look to the statutes providing for the wants of persons charged with felony, it appears from section 3 of chapter 161 that medical attendance and clothing for persons in jail, charged with felony, shall be paid out of the State treasury. The service of a stenographer in taking down the testimony on his trial is also thus paid. And section 1 of chapter 159 of the Code provides that the accused shall be allowed counsel, if he so desires, to assist in his defense, a copy of the indictment, and a list of the jurors selected or summoned for his trial, without fee; and, while this may be interpreted, without expense to the accused, yet, if it is to be paid by the county, why is the statute silent on this point? If the manner of payment is to be governed by the statute controlling the payment of his other necessary expenses, it would be paid by the State, and not by the county. There is no statute that even by the most remote analogy makes this twenty-five dollars a charge against the county. If it is claimed that the judgment fixes the liability on the county, and for that reason prohibition will not lie, I answer that it would create a deplorable state of affairs if every claim, however illegal or unfounded, would be made legal and valid by suing before a justice and obtaining a judgment against the county; but, fortunately, such is not the law of this State, and it has been so held in several cases. Prohibitions will lie to prevent the enforcement of judgments, even after executions have been placed in the officer's hands. In *French* v. *Noel*, 22 Gratt. 544, (Syl., point 3), it was held that "after the judgment of the circuit court has been rendered, as well as before, the person injured by the judgment may apply to the court of appeals for a writ of prohibition to restrain the appellant and the judge from proceeding to enforce said judgment." See, also, *Hein* v. *Smith*, 13 W. Va. 358, (Syl., point 3); *Wilkinson* v. *Hoke*, 39 W. Va. 403, (19 S. E. 520). I am aware that this Court, in the case of *Wells* v. *Town of Mason*, 23 W. Va. 456 (a *mandamus* case to compel said town to pay a judgment in favor of Wells for medical services rendered to a pauper, in which town it was not the duty of

the common council to support the poor residing therein), held, that the judgment in said case conclusively determined that the town was chargeable with the sum for which judgment was rendered, and that the payment of such judgment against a town, however erroneous, if no writ of error has been taken, should be provided for by taxation, and if it be not done, and it cannot be collected by execution, its payment should be enforced by *mandamus*. But this judgment was obtained before the Mason County court on the 4th of June, 1877, the court at that time being a court of general jurisdiction, and no question was raised as to the jurisdiction. In *Galpin* v. *Page*, 18 Wall. 350, 21 L. Ed. 959, it was held that: "A court of general jurisdiction, proceeding within the general scope of its powers, is presumed to have jurisdiction to give the judgment it renders, until the contrary appears; and this presumption embraces jurisdiction not only of the cause or subject-matter of the action in which the judgment is given, but of the parties, also. The rule is different with respect to courts of special or limited authority. Their jurisdiction must affirmatively appear by sufficient evidence or proper averment in the record, or their judgments will be deemed void on their face." So, also, in *Pulaski Co.* v. *Stuart*, 28 Gratt. 872, we find that, "where a court of general jurisdiction acts within the scope of its general powers, its judgment will be presumed to be in accordance with its jurisdiction, and cannot be collaterally impeached." As we have seen, it is different where the suit is brought before a justice. In *Mayer* v. *Adams*, 27 W. Va. 245, it was held that "the jurisdictional facts necessary to give a court of special and limited jurisdiction a right to act must appear in the record of its proceedings, or such proceedings will be regarded as bad, without any jurisdiction, and therefore absolute nullities." As to courts of inferior jurisdiction, it is said in 12 Enc. Pl. & Prac. 176, that "no presumption is indulged in favor of the jurisdiction of inferior courts exercising special statutory powers not according to the course of the common law, but their records must affirmatively show the facts which confer jurisdiction."

It may be suggested in this case that the facts proven were not certified, and for that reason it cannot be deter-

mined whether the justice had jurisdiction or not. To this suggestion I reply that no proof could possibly be furnished which would make the debt upon which this suit was predicated the legal debt of the county, and service of process upon the president of the county court could not confer jurisdiction. The character of the plaintiff's claim is set forth in his complaint, and while he avers that it was presented to the county court for payment at its May term, 1899, he does not allege that payment thereof was refused, which the statute makes a condition precedent to a suit upon any claim against the county founded on contract. In this case no writ of error could have been obtained from the judgment of the circuit court, because the amount involved was insufficient, and prohibition was the only remedy. Upon the question as to whether the judgment of the court was conclusive of the fact that the county of Taylor was chargeable with said claim, in the case of *Bodley* v. *Archibald*, 33 W. Va. 229, (10 S. E. 392). SNYDER, P., delivering the opinion of the Court, held, that "prohibition will lie to prohibit justices, and other petty tribunals which are limited by law to the decision of controversies where the amount falls within a specified sum, from exercising a jurisdiction wholly beyond their authority, even after judgment, but before the judgment has been fully carried into effect, and in such cases the want of jurisdiction may be made to appear by matters *dehors* the record of the proceedings before such inferior tribunals." See, also, High, Extr. Rem. § 774, and *Manufacturing Co.* v. *Carroll*, 30 W. Va. 352, (4 S. E. 782), in which the circuit court was prohibited from enforcing a decree after it was rendered.

The character of the claim sued on before the justice in this case is shown by the transcript of the justice's proceedings, and no new pleadings were filed in the circuit court on appeal; and this Court will take cognizance of the fact that there is no statute authorizing the payment of such a claim by the county court, or creating any liability upon the county for the payment of attorneys appointed by the circuit court to perform such services. Now, while no formal plea to the jurisdiction was filed before the justice, yet facts were stated in the plea which showed that

no suit could be brought on the claim against the county —First, because the claim had not been presented to the county court and disallowed; and, secondly, because the claim presented was not of such character as to bind or authorize the defendant to levy upon the taxpayers for its payment. The statute provides that such pleadings are not required to be in any particular form, but must be such as to enable a person of common intelligence to know what was intended. On the question of jurisdiction of the subject-matter, we find on pages 188, 189, 12 Enc. Pl. & Prac., the law thus stated: "When the court has no lawful power to act by reason of the fact that such power is not conferred, or is expressly withheld, with regard to the subject-matter of the suit, the parties thereto cannot be said to have waived their objection to the want of power because it is not made at the proper time. Such objection cannot be waived, and is fatal at any stage of the proceedings,"—citing *Beckley* v. *Palmer*, 11 Gratt. 625. The recovery of the claim sued on in this case from Taylor County is not authorized by the common law, because the service rendered in defense of said criminal, although it might entitle the plaintiff to compensation, created no liability upon the county to pay the same, and no statute authorizes its payment by the county. In the case of *Norfolk and W. R. Co.* v. *Pinnacle Coal Co.*, 44 W. Va. 574, (30 S. E. 196), 41 L. R. A. 414, this Court held that, "although a justice of the peace has jurisdiction of civil actions of debt, he exceeds his legitimate powers whenever he extends such jurisdiction to include matters of controversy or causes of action unknown to the common law, and unauthorized by legislative enactment." It is manifest that a claim unauthorized by law is sought to be legalized by service of process on the president of the county court of Taylor County, and obtaining a judgment for the amount thereof before a justice, when the justice had no jurisdiction, either of the defendant or the subject-matter. In my opinion, a writ of prohibition should be awarded, to prevent the circuit court of Taylor County from further proceeding to enforce the judgment rendered by it upon appeal from said justice's judgment against the county court of Taylor County.

DENT, JUDGE, (*concurring*).

The only question presented in this case is whether the judgment of the circuit court sustaining an allowance to one of its attorneys, to be paid out of the county treasury, for defending a person charged with felony, by its appointment, is void. If it is, the writ should go; and, if not, it should be refused, it matters not how erroneous the judgment may be. The legislature has not authorized the allowance of such fees out of the county treasury. Section 1, chapter 138, Code, provides, "A poor person may be allowed by a court to sue or defend a suit therein without paying fees or costs, wherupon he shall have from any counsel which the court may assign him and from all officers all needful services and process, and also the attendance of witnesses without any fees to them therefor, except what may be included in the costs recoverable from the opposite party." This plainly refers to civil cases alone, and not to criminal. It is provided in section 14, Article III, of the Constitution, that persons charged with crime "shall have the assistance of counsel." And section 1, chapter 159, Code, provides, "The accused shall be allowed counsel, if he desires it, to assist him in his defence." Section 7, chapter 161, Code, providing for costs in criminal cases, is in these words: "A sheriff or other officer for travelling out of his county to execute process in a case of felony and doing any act in the service thereof for which no other compensation is provided, shall receive therefor out of the treasury such compensation as the court from which the process issued may certify to be reasonable. When in such case an officer renders any service for which no specific compensation is provided, the court in which the case may be may allow therefor what it deems reasonable, and such allowance shall be paid out of the treasury." This section applies to felony cases only. An attorney is an officer of the court, especially when acting by its appointment in the defense of a person charged with a felony. The services of all other officers of the court are specifically provided for in this or other sections of the law, and it is impossible to conceive of any service to which this provision is more applicable than that of the appointed attorney for the defense. To appoint an unpaid attorney, inex-

perienced or unlearned, to go through the mere form of making a defense undoubtedly falls short of a compliance with the constitutional provision that the accused shall have the assistance of counsel. It is to keep the letter, but not the spirit, of the constitution. To serve an indigent person charged with felony is to fulfill the constitutional guaranty for the benefit of the people who made the Constitution. To compel an attorney to do so without pay is tyrannous. And ordinarily a defense made by a feeless advocate is a farce, while a proper defense inures to the benefit, integrity, and good name of the State. It is better even that a guilty man should escape, than that the State should be put to the expense and ignominy of confining, feeding, clothing, and guarding an innocent man by reason of a legal abortion. It seems very plain, then, that this provision was intended to authorize the court to allow a reasonable compensation to an attorney, as one of its officers, for services rendered in defense of a charge of felony. Whether it does or not, there is no provision authorizing such allowance to be made out of the county treasury. The common law on this subject is stated to be that: "It is a part of the general duty of members of the bar to act as counsel for persons accused of crime, and destitute of means, upon appointment by the court, when such service is not inconsistent with their duty to others; and in such cases they must look alone to the possible future ability of the accused to pay for their compensation where no provision for compensation is made by statute. No implied liability arises on the part of the county or State to pay for such services." 3 Am. & Eng. Enc. Law, (2d Ed.) 417, 418. Where the State deprives a person of his liberty or his life, his possible future ability is most too remote to look to alone for compensation for legal services. "An attorney is an officer of the court, and he takes his office with all its burdens as well as all its rights and privileges; and among the burdens thus assumed is that of being obliged, when requested by the court, to conduct without compensation the defense of those who are destitute of means, and are accused of crime." Cooley, Const. Lim. (4th Ed.) 412. And in the case of *Presby* v. *Klickitat Co.* (Wash.) 31 Pac. 876., it is said: "In some instances, no doubt, it is a hard-

ship upon an attorney to be obliged to defend poor persons without compensation; but, when called upon, it is a duty he owes to the profession, to the court engaged in the trial, and to the cause of humanity and justice, not to withhold his assistance, nor spare his best exertions, in the defense of one who has the double misfortune to be stricken by poverty and accused of crime." Thus, individually, in the cause of humanity, he must take upon himself, through Christian charity, the obligation that belongs to, and has been assumed by, society. If one is poor and needy, although he be just as poor and needy himself, he must generously give his time and labor free of charge, that the public, which is rich in lands and resources, may escape the burden. Such, however, is the law of this State, unless, as heretofore shown, it is changed by statute. A different rule entirely prevails in Indiana and Wisconsin, and in some other states the statutes have made proper provision for such cases. In the case of *Webb* v. *Baird*, 6 Ind. 17, it is forcibly said: "That any class should be paid for their particular services in empty honors is an obsolete idea, belonging to another age, and to a state of society hostile to liberty and equal rights. The legal profession having been thus stripped of all its odious distinctions and peculiar emoluments, the public can no longer justly demand of that class of citizens any gratuitous services which would not be demandable of every other class. To the attorney, his profession is his means of livelihood. His legal knowledge is his capital stock. His professional services are no more at the mercy of the public, as to remuneration, than are the goods of the merchant or mechanic. The law which requires gratuitous services from a particular class in effect imposes a tax, to that extent, upon such class, clearly in violation of the fundamental law, which provides for a uniform and equal rate of assessment and taxation on all citizens. * * * But even charity itself almost ceases to be a virtue when they whose duty it is to provide for the poor make private charity a pretext for public neglect. If the State has not made provision for the defense of poor prisoners, it has presumed and trespassed unjustly upon the rights and generous feelings of the bar; levying upon that class a discriminating and un-

constitutional tax. *Blythe* v. *State*, 4 Ind. 525. It is therefore not their duty, and, under the circumstances, if no constitutional provision is made by law, no very great virtue, to encourage public neglect by gratuitous service." In *Dane Co.* v. *Smith*, 13 Wis. 585, it was held that it was the duty of the state courts to appoint counsel to defend indigent persons charged with crime, and that the statute requiring them to render such services gratuitously was unconstitutional and void.

The legislature of this State having, to its honor, provided for such compensation out of the State treasury, precludes the idea that in any event such compensation could be made a charge against the county treasury, and any allowance made out of the same is a pure donation or gratuity to the State. Whether a poor person, a ward of the county, charged with a misdemeanor, should not be defended by the county, is left for future consideration. It is probably better for counties to support their poor out of jail, where they can assist in their own support, than it is to support them in jail. Hence they have a pecuniary interest in keeping the indigent poor from being confined in jail at public expense. In this light, reasonable compensation paid to attorneys out of the county treasury might not be ill placed,—a drawing at the spigot to stop a leak at the bung. Of course, if the counties can get as good an article gratuitously, it is usually considered public economy to accept it, although thereby the bread be donated from the table of poverty to preserve untouched the plethoric coffers of the opulent. A free donation by any court out of the public treasury is void. In section 120, chapter 1, Frem. Judgm., it is said: "If a court grants relief which under no circumstances it has any authority to grant, its judgment, to that extent, is void; as where it orders a donation out of the public treasury." And in *Bridges* v. *Supervisors*, 57 Miss. 255 (a case cited to sustain the text), it is said: "The circuit court was equally powerless to make such an appropriation, and its judgment ordering it, if the nature of the claim appeared by the record, would have been a nullity. Certainly no additional validity would have been given to it by submitting the claim to a jury. Fortunately there is no provision in our laws

by which any court is authorized to determine that a donation shall be made out of the public treasury. Courts may enforce the legal or equitable rights of parties, but they are without jurisdiction to adjudicate and enforce claims which rest solely on motives of generosity." In such cases of donation, ordinances and statutes are held to be void. Judgments are no more sacred. *Ohio Valley Iron Works* v. *Town of Moundsville*, 11 W. Va. 1; *Citizens' Savings and Loan Ass'n* v. *City of Topeka*, 20 Wall. 655, 22 L. Ed. 455; *Parkersburg v. Brown*, 106 U. S. 487, 1 Sup. Ct. 442, 27 L. Ed. 238. Courts may hear and determine, but cannot legislate. Rendering judgments without law is legislation. *Norfolk and W. R. Co.* v. *Pinnacle Coal Co.*, 44 W. Va. 574, (30 S. E. 196), 41 L. R. A. 414. The donation being void as a usurpation of power, a judgment founded upon it is void for the same reason. This would seem to militate against the decision of this Court in the case of *Wells* v. *Town of Mason*, 23 W. Va. 456. On page 465 JUDGE GREEN says: "But the Court did not, in this or in any other case that I have seen, undertake, when asked to issue a *mandamus* to compel a town to pay a judgment, to inquire into the legality of the judgment, or whether the debt for which the judgment was rendered was legally a just debt against the town." The same may be said in this case, but where the judgment shows on the face of the record its void character, the court will not only refuse to enforce it by *mandamus* but will prohibit its enforcement by prohibition. In that case there was nothing on the face of the record to show that the judgment was void. It was rendered for services of a physician to an indigent sick person living in the town. The town claimed that the county should pay it, as in this case the claim is that the State should pay. In that case the litigation was before the county court, which gave judgment against the town. In this case the litigation is before the circuit court. In that case it was impossible to say the town was in no event liable for the payment of the claim sued on; for it was liable in certain contingencies which might have been made to appear on the trial, as since decided by this Court in the case of *Thomas* v. *Town of Mason*, 39 W. Va. 526, (20 S. E. 580), 26 L. R. A. 727. But in this case, as shown on the

face of the record, the county was in no event liable to pay the claim sued on; it being a donation out of the county treasury by the circuit court, without legal authority to make such allowances. It was a mere gift, from want of legal consideration to support it. Physicians have never been required to give their services gratuitously to poor persons. It is otherwise with lawyers, and they are still under such disability, unless relieved by statute. In felony cases the county treasury is still closed to them. The State treasury is unlocked, though carefully guarded, and a reasonable compensation should not be denied them for the faithful discharge of the duties imposed on them as officers of the court. Though reluctantly, the prohibition must be awarded as prayed. I concur in the syllabus and conclusions, but not in the opinion of ENGLISH, J., in its entirety.

BRANNON, JUDGE, (*concurring.*)

Had the justice jurisdiction of this case? Was his judgment against the county court for a lawyer's fee allowed by the circuit court for defending one accused of felony utterly void, so as to warrant prohibition, or was it merely erroneous, because of error of judgment in granting recovery upon a claim constituting no basis of action? All the members of this Court are of the opinion that a circuit court cannot allow an attorney for such service, payable out of the county treasury. The county court cannot make an allowance, to be paid by taxes on the people, without statutory authority; and no statute authorizes it to make an allowance for such a demand. But that does not settle the question. The justice has jurisdiction of a suit for money due on contract. The particular demand may not warrant recovery in law, but that does not show he has no jurisdiction of the case; and merely because he holds that a demand, not in law warranting the recovery, does justify recovery, does not render his judgment void. It is only erroneous, and the fact that it is for too small an amount to warrant an appeal does not alter the case. "In the case of an inferior court, if its record does show that facts necessary to give it jurisdiction existed, its jurisdiction will not be open to attack, nor can proof of

such facts be demanded, or disproof thereof admitted in collateral proceedings." *Cecil* v. *Clark*, 44 W. Va. 659 (30 S. E. 216) (Syl., point 12). This case was appealed to the circuit court, and it is the judgment of that court that is sought to be prohibited. If it were a judgment of that court in an original action in it, not on appeal from a justice, it would seem that *Wells* v. *Town of Mason*, 23 W. Va. 456, would forbid prohibition, as it holds that a judgment against a town will be enforced by *mandamus*, though rendered for medical attendance on a pauper not chargeable to the town, because the judgment is not void, but simply erroneous; but I think we must regard the judgment in this case as if rendered by the justice, since, if he had no jurisdiction, neither had the circuit court on appeal. My own individual view is that the justice had jurisdiction. The test of jurisdiction is, has the court power to begin to determine? Has the court power to take up and examine the merits, and determine whether it can or cannot give judgment on the merits? If so, it has jurisdiction, and its judgment, though grossly erroneous, is not void. In this case the justice had a right to consider the evidence, and determine whether he ought to render judgment. The only question in my mind is from the fact that the plaintiff filed in the justice's record the order of the circuit court allowing him the fee, and thus showed by that record a ground of action which the law branded as no ground of action. Still, for myself I think that rendered the judgment merely erroneous, not void. My views are stated in full in the dissent in the case of *Norfolk & W. R. Co.* v. *Pinnacle Coal Co.*, 44 W. Va. 580 (30 S. E. 196), 41 L. R. A. 414. I think the decision of the Court in that case would justify a prohibition in this case, and, following it, not my own personal views, I agree to the award of a prohibition in this case. That case is binding law.

Writ Granted.

CHARLESTON.

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STEELSMITH *et al. v.* FISHER OIL CO.

Submitted September 13, 1899—Decided January 24, 1900.

1. INJUNCTION—*Motion—Dissolution.*

It is a general rule not to continue a motion to dissolve an injunction, unless from some very great necessity, because the court is always open to grant, and, of course, to re-instate an injunction whenever it shall appear proper to do so; and because, too, the plaintiff should always be ready to prove his bill. (p. 400).

2. PARTIES—*Lessees—Lessors.*

When the lessees of an oil and gas lease bring their suit against the lessees of an adjoining tract to enjoin them from trespassing upon the plaintiffs' premises, and from proceeding to drill a well for oil and gas which defendants claim is on their own lease, but which plaintiffs claim is on their premises, the lessors of both leases, and all persons having an interest in the oil or gas which might be produced from the well, the drilling of which is sought to be enjoined, are necessary parties to the suit, to enable the court to settle the rights of all parties interested or affected by the subject-matter in controversy. (p. 399).

3. BILL—*Answer—Motion—Dissolution—Rule.*

When a motion to dissolve an injunction is heard upon bill and answer and affidavits filed, the answer denying the material allegations of the bill, it is not error to consider at the same time, and refuse, a petition for a rule against the defendant for contempt for violation of the injunction order, and to enter such refusal in the same order dissolving the injunction. (p. 401).

Appeal from Circuit Court, Tyler County.

Suit by Amos Steelsmith and another against the Fisher Oil Company for an injunction. Decree for defendant, and plaintiffs appeal.

Affirmed.

ROBERT MCELDOWNEY and MCCOY & HANES, for appellants.

F. L. BLACKMAR, for appellee.

MCWHORTER, JUDGE:

Amos Steelsmith and A. J. Yoke filed their bill in the circuit court of Tyler County against the Fisher Oil Company, a corporation, alleging that they were the owners of a certain oil and gas lease executed on the 6th day of June, 1898, by C. P. Lowry and M. R. Lowry, his wife, to A. J. Yoke, who afterwards conveyed a part of same to Amos Steelsmith, on that certain tract of land and leasehold estate situate in Ellsworth district, in said Tyler County, containing 44 acres, more or less (describing the land by the names of contiguous landowners); that under the terms of their lease they had the exclusive right to drill and operate thereon for gas and oil, and took possession and proceeded to develope and operate it for oil, and drilled a well, which is a good producer; that the defendant company, operating an adjoining lease, entered upon and erected a derrick on their said lands, and were proceeding and about to drill the same and take the oil therefrom, notwithstanding the protests and notices of plaintiffs; that the location and drilling of said well upon their said leasehold to take the oil is an act of trespass, and would cause waste and irreparable injury and damage, not susceptible of complete pecuniary compensation, and would lead to vexatious litigation, if permitted to proceed; that the machinery and boiler attached to the derrick and lights used for drilling at night in said derrick erected by defendant on plaintiffs' lands were placed within a dangerous proximity to the tank, rig, and well of plaintiffs, which is a large producer, and flowing oil, and what is called "lively oil"(full of gas); that the location of said boiler and rig being within a short distance of plaintiffs' three-hundred-barrel tank, full of oil, and the gas exuding therefrom, make it not only liable to destruction from fire from said boiler and lights in the derrick, but a constant menace to the lives of plaintiffs and their employes working and managing their property; that the same is liable to

cause irreparable damage in its nature, but the danger to life as aforesaid makes the location of the same a dangerous nuisance; that plaintiffs are wholly without remedy, save in a court of equity, and if compelled to submit to the slow, tedious process of a law court, they would suffer irreparable loss and injury, and have their lives endangered by the acts complained of. And they pray that defendant be made a party to the bill, and answer same; that process issue; that defendant, its agents and employes, and each of them, and all of those interested with them, be inhibited and enjoined from doing the things complained of, from committing acts of trespass or waste, or in any manner interfering with plaintiffs in the possession of their lease,—and for special and general relief, and file with their bill a copy of their lease from C. P. and M. R. Lowry. An injunction was granted accordingly. The Fisher Oil Company served notice on June 21, 1899, that on the 23d day of June it would move the court to dissolve the injunction in the cause. On the 23d of June, plaintiffs moved to quash the notice because the same was insufficient and not reasonable as to time, which motion to quash was overruled; but the court deeming the time not sufficient, gave further time, until June 27th, for the hearing. Plaintiff A. J. Yoke presented his petition and affidavit, praying that a rule do issue against the defendant, the Fisher Oil Company, and the employes of said company, to wit, Al. Stoner and Hugh Daily, to show cause why they should not be held to answer for contempt of court in violating the order of injunction in this cause; the consideration of which matters was deferred until the 27th of June, 1899. And on the 30th day of June the cause was brought on to be heard, when the defendant demurred to the bill, and presented its answer, to the filing of which plaintiffs objected. The objection was overruled, and the answer filed, and plaintiffs excepted to the answer, and the exception was overruled; and defendant filed nine affidavits in support of its motion to dissolve the injunction, with objections to the consideration of said affidavits, and the plaintiffs filed nine affidavits in support of their opposition to said motion, to which affidavits defendant objected, all of which objections were overruled, and all of said affidavits filed. The answer

denies that C. P. Lowry and M. R. Lowry, his wife, leased to Yoke the tract of forty-four acres of land set out in the bill, but avers that the same belongs to Kate Morrow, who holds the title in fee, and that Kate Morrow and John Morrow, her husband, made an oil and gas lease for said forty-four acres to C. P. Lowry and M. R. Lowry, dated June 27, 1897, which was recorded, etc., and that by assignment of June 6, 1898, recorded, etc., said Lowrys assigned said lease (reserving to themselves a one-sixteenth interest) to A. J. Yoke, and that A. J. Yoke assigned an interest in said lease to Amos Steelsmith, and A. J. Yoke also assigned an undivided one-fourth interest in said lease to M. E. Hagan; that at the time of the institution of this suit the following named persons were interested in the lease of the land described in plaintiff's bill, to wit, A. J. Yoke, Amos Steelsmith, C. P. Lowry, M. R. Lowry, and M. E. Hagan; and that the plaintiff's bill is defective for want of proper parties as plaintiffs therein. Defendant admits that the persons who are owners of the lease of the land described in plaintiffs' bill are entitled to have the sole and exclusive right for drilling and operating for oil and gas upon said leasehold property, and admits therein having located and drilled a well thereon, which is producing a large quantity of oil; that said well is located fifty-two feet from the easterly line of the lands of M. V. Bowser; that the well had been completed some five or six weeks, and had produced over two hundred and thirty barrels per day from the time of its completion; that plaintiffs worked said well to its fullest capacity, by frequently shooting and agitating the well; admits the possession of plaintiffs of their leasehold, but denies it has entered upon their premises and proceeded to drill or operate on their land to take the oil therefrom; denies any act of trespass, or that would cause waste or irreparable injury or damage to plaintiffs; denies that defendant's machinery, boiler, and derrick which is being used to drill a well on the land of M. V. Bowser is located on plaintiffs' land, or was erected on plaintiffs' land, or that such machinery, etc., had been placed within dangerous proximity to the tank, rig, and well of plaintiffs; denies that any lights have been used or were being used at the institution of this suit for drilling at night in the der-

rick of defendant on the M. V. Bowser land. Defendant admits that plaintiffs' well located on the Morrow land is a large, flowing producer, and says that said well is rapidly draining the oil from the M. V. Bowser land, of which land defendant has had a lease for oil and gas purposes since March 17, 1897, upon which defendant was operating for oil and gas under said lease at the time of the institution of this suit, and was drilling the well complained of in plaintiffs' bill as an offset to the well of plaintiffs upon the Morrow land, and that the nearest producing well of defendant upon the Bowser land was about nine hundred feet distant from plaintiffs' well described in the bill; and denies that the location of defendant's boiler and rig is liable to cause irreparable damage to plaintiffs or to the lives of themselves or employes; alleges that defendant has taken all possible care and precaution to so locate and so operate the boiler used for drilling said well, and the light used at night, as to not endanger the said well of plaintiffs; that said boiler is located upon the Robert Rice farm, one hundred and sixty feet distant from plaintiffs' oil tank, and that the gaslight used by defendant is at a safe distance from plaintiffs' well; that it has kept an extra man at its boiler ever since it commenced to drill, whose duty it was to keep watch of the well of plaintiffs on the Morrow land, and described minutely the precautions taken for safety; that it had given A. J. Yoke information of its purpose to drill said well upon the Bowser lease, and requested him to put a gas stack upon their oil tank, and told him (Yoke) that it would use all care and precaution possible in drilling said well, so as not to endanger plaintiffs' well on the Morrow land, and that it has done so; avers that A. J. Yoke, when he verified the bill in this cause, well knew that defendants' well was not on the Morrow land (plaintiffs' leasehold); that defendant had committed no act of trespass upon plaintiffs' leasehold that would cause waste or cause irreparable injury or damage that would not be susceptible of complete pecuniary compensation, and that defendant had not at any time trespassed upon plaintiffs' leasehold; and avers that this suit was brought and injunction obtained for the purpose of hindering and delaying defendant in the completion of its well on the Bowser land,

so that plaintiffs could continue to drain the oil from said land through their well on the Morrow land, located within fifty-two feet of the line of defendant's leasehold.

On the hearing the court refused to issue the rule for contempt, and found, from the weight of the evidence contained in the affidavits, that the averments of the bill that the derrick of the Fisher Oil Company is located in whole or in part upon the leasehold of plaintiffs is not sustained by the proofs, but is disproved, and decreed the dissolution of the injunction, from which decree the plaintiffs appeal, and assign the following errors: (1) It was error to read the affidavits filed by the defendant, over the objection of the plaintiffs; the said affidavits being mainly as to a certain fence claimed by the defendant to be upon the line between the lands of Morrow and Bowser, and there being no leasehold or deed of the defendant, or even any plat showing any such boundary, and nothing by which any such affidavits can be made intelligible. There is no proper evidence in the case showing the metes and bounds of the Bowser land, or the leasehold of the defendant; no paper title showing that defendant or its grantor had any right to claim the fence mentioned in said affidavits as a line fence between the Bowser and Morrow lands. (2) It was error to hear the case upon the answer, setting up new matter, without giving the plaintiffs time to reply by affidavit or otherwise. (3) The court erred in dissolving the injunction upon the ground alone that, in its opinion, the affidavit showed that the derrick of the defendant was not, in whole or in part, on the lands of the plaintiffs, without also determining the right of the plaintiffs to have the injunction perpetuated on account of the threatened danger to their property by the work of drilling the well of the defendant; it appearing from both the bill and the answer that the well of the plaintiffs is what is called a "wild well," and the plaintiffs, having first produced oil at that place, being entitled to protection from any threatened danger to their property by the drilling of wells subsequently by other parties. (4) The court erred in determining the weight of the evidence upon the question of whether or not the derrick of the defendant was in whole or in part on lands of the plaintiffs, because the defendant

nowhere files any paper showing any metes or bounds of their premises, nor is there any proof that the defendant has any lease upon the property of Virgil Bowser, save the naked statement of the answer, when at the same time the plaintiffs show by the affidavit of two surveyors, M. A. Brast and J. J. Sammons, who surveyed the line according to the title paper shown by the plaintiffs, that the derrick was at least eleven feet upon the lands of the plaintiffs. (5) The court further erred, also, in overruling the exceptions to the answer of the defendant, when the same is insufficient for the reason that it does not, by exhibit or otherwise, show the location of the leasehold of the defendant. (6) The court erred in prematurely hearing the cause and dissolving the injunction. (7) The court erred in considering the petition, and affidavits in support of same charging contempt by defendant, praying for a rule, together with the motion to dissolve the injunction, and disposing of same by the same order by which the injunction was disposed of.

This is a contest between plaintiffs and defendant for the supply of oil beneath the surface near the line between two leasehold estates. Plaintiffs already have a large producing well upon their land, which is supposed to be, and probably is, drawing the oil from the premises leased by defendant, while defendant is attempting to drill a well on its said lease in close proximity to plaintiffs' well, to offset the well of plaintiffs, to "protect its lines," and save to itself the oil it may get. The main question between the parties is the location of the line between the two properties. Plaintiffs' bill alleges that they had had quiet and peaceable possession of the land claimed by them, and their possession had not been interfered with until a recent date, when the defendant, operating an adjoining lease, entered upon, and erected a derrick on plaintiff's land, and was proceeding to drill the same and take the oil therefrom. This the defendant denies. The parties file affidavits concerning the location of the line between them. It is contended by appellants that the affidavits were mainly as to a certain fence claimed by defendant to be on the line between the lands of Morrow and Bowser; there being no leasehold or deed of the defendant, no proper evidence in

the case showing the metes and bounds of the Bowser lands, and no paper title showing that defendant or its grantor had any right to claim the fence as a line. This was unnecessary, when the bill alleged that it held the adjoining land by lease, and was operating it. All that was to be done was to ascertain the line between the two leases, and this the affidavits on either side undertook to establish. When the line of plaintiff's lease was established, it established the Bowser line as well; and some of the affidavits were to the effect that Bowser and Morrow both agreed that the fence was on the line, and had been for nearly twenty years regarded by both parties as the line, working up to it on their respective sides all that time, and treating it as the division line between the two properties. True, John Morrow, in his affidavit, claims that the fence is on his wife's land, claiming that he and Bowser had the line run, and it was then agreed by Bowser that the fence at that end was wholly on the Morrow land; but he is contradicted by Bowser and several disinterested witnesses. J. C. Warner, county surveyor of Tyler County, says he surveyed the line on June 19, 1899, and that both Bowser and John Morrow were present. He asked them about the fence that he found on the line between them, and they said they had always recognized it as the line fence, and there never had been any dispute over this line between them, and they had farmed up to this line on both sides. He further says: "I found a heavy fence row that had grown up—of brush and saplings—along the line between the lands of Kate Morrow and M. V. Bowser, as I traced the line. The derrick situated upon the land of M. V. Bowser is wholly on his land." He says that John Morrow, the husband of Kate Morrow, was present at the time he ran the line, and sighted through his compass along that line, and remarked that the line did not hit the derrick of the Fisher Oil Company on the Bowser land. Warner says he has been acquainted with that line, as a surveyor, since the time it was settled by a lawsuit in the Tyler circuit court between Martin L. Bowser, plaintiff, and Mercer and Roberts, defendants,—he thinks, between the years 1867 and 1872.

As to the second assignment: The defendant sets up

no new matter, except that which refers to the fact that the lessors of A. J. Yoke were not the owners of the forty-four acres of land leased, but that it was owned in fee by Kate Morrow, who had leased the same to C. P. Lowry and M. R. Lowry, and that Yoke had assigned an interest in his lease to M. E. Hagan, and that the Lowrys and Hagan were necessary parties to the bill; and, as to the said C. P. Lowry and M. R. Lowry, they appeared on the face of the bill to be necessary parties, and the bill was defective for that reason; and the lessor of the defendant, the Fisher Oil Company, which the bill alleged was operating an adjoining lease, was also a necessary party defendant. *Moore* v. *Jennings*, *supra*. (34 S. E. 793). Appellants cite *Grobe* v. *Roup*, 46 W. Va. 488, (33 S. E. 261), where it is held "error to dissolve an injunction on affidavits, merely, when by the pleadings the burden of proof is on the defendant, moving such dissolution, as the plaintiff has the right to cross-examine defendant's witnesses and rebut their testimony." This cannot apply in the case at bar, for the reason that under the pleadings the burden is on plaintiffs, as the allegations are denied by the answer, and plaintiffs are required to prove their allegations.

Third: That the court dissolved the injunction on the ground alone that in its opinion the derrick of defendant was not in whole or in part on plaintiffs' land, without also determining the right of plaintiffs to have the injunction perpetuated on account of the threatened danger to their property, etc. The cause was heard upon the bill and answer, the affidavits, and upon the motion to dissolve the injunction. The answer denied all the material allegations of the bill not admitted by defendant. The only questions involved are that of the location of the line, and the threatened danger to the property and works of the plaintiffs. As to the allegation of threatened danger, the defendant "denies it fully, fairly, plainly, distinctly, and positively." *Hayzlett* v. *McMillan*, 11 W. Va. 464. Affidavits were filed touching that question, and which were considered. It was unnecessary for the court to state any reason for dissolving the injunction. It was sufficient to show upon what it was heard, and that in consideration thereof the court dissolved or refused to dissolve the injunction, as the

judgment of the court might be; and, if the record justifies the action of the court, it will be sustained by the appellate court.

Fourth assignment: That the court erred in determining the weight of evidence upon the location of defendant's derrick,—whether it was in whole or in part upon the lands of plaintiffs,—because defendant files no paper showing any metes and bounds of the premises, and there is no proof that defendant had any lease upon the property of Bowser, save the naked statement of the answer, etc. The bill alleges that the derrick is on plaintiffs' land. The answer denies it flatly and fully. The affidavits overwhelmingly support the answer. As to the defendant having a lease on the Bowser property, the bill alleges it, and the answer admits it and avers it. Besides, it is proven by some of the affidavits. It seems to me that plaintiffs will hardly be permitted to dispute the allegation of the bill, especially when it is admitted by defendant.

The fifth assignment has been disposed of with the first and fourth.

Sixth: That the court erred in prematurely hearing the cause and dissolving the injunction. When the parties appeared in pursuance of notice of motion to dissolve the injunction on the 23d day of June, 1899, plaintiffs claimed that the notice was not reasonable as to time, and moved to quash it on that ground. The court overruled the motion, but postponed the hearing to give plaintiffs further time, and the cause came on to be heard on the 30th day of the same month. In *Horn* v. *Perry*, 11 W. Va. 694 (Syl., point 3): "It is a general rule not to continue a motion to dissolve an injunction, unless from some very great necessity, because the court is always open to grant, and, of course, to reinstate, an injunction whenever it shall appear proper to do so; and because, too, the plaintiff should always be ready to prove his bill." *Radford* v. *Innis*, 1 Hen. & M. 8; *Arbuckle* v. *McClanahan*, 6 W. Va. 101. In *Western Min. and Mfg. Co.* v. *Virginia Cannel Coal Co.*, 10 W. Va. 250, (Syl., point 11): "A bill of injunction is fatally defective which does not aver good title in the plaintiff, contains no charge of insolvency against the defendants, does not show that irreparable damage will result if the injunction

is denied, and prays an injunction to restrain a naked trespass upon real property." *Cox* v. *Douglass*, 20 W. Va. 175; *Moore* v. *Jennings*, before cited; *Watson* v. *Terrell*, 34 W. Va. 406, (12 S. E. 724); *Hale* v. *Railroad Co*, 23 W. Va. 454; *Bettman* v. *Harness*, (W. Va.) 26 S. E. 271, 36 L. R. A. 566; *Allison & Evans' Appeal*, 77 Pa. St. 221; *Kelley* v. *Oil Co.*, 57 Ohio St. 317, 49 N. E. 399, 39 L. R. A. 765.

In support of the seventh assignment, that it was error to consider the petition, and affidavits in support thereof charging contempt, and praying for a rule, with the motion to dissolve the injunction, and to dispose of the same in the same order by which the injunction was disposed of,—appellants cite *State* v. *Irwin*, 30 W. Va. 404, (4 S. E. 413), where it is held that after a rule has been issued for contempt, "served on the defendant, and returned to the court, then the contempt proceeding should be entirely separate from the chancery suit, and placed on the docket, entitled, 'The State of West Virginia, at the Relation of' the party at whose instance it was issued against the offender, and be prosecuted on the law side of the court to judgment," etc. This is only after the proceeding in contempt is begun, and process issued and served. In the case at bar the court had the whole case before it, and it was competent for it to decide whether, under the circumstances of the case, a proceeding for contempt should be instituted by the issuance of a rule; and, having decided not to issue the rule, there was no prosecution to take its place on the law side of the court to be prosecuted to judgment. The decree of the circuit court is affirmed.

Affirmed.

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CHARLESTON.

CECIL *et al. v.* CLARK *et al.*

HALL *et al. v.* SAME.

Submitted November 2, 1899—Decided January 24, 1900.

1. WASTE—*Co-Tenant—Accounting.*
   Extraction of coal by one tenant in common without consent of another is waste, for which he must account to that other. (p. 402).

2. SEC. 14, CHAP. 100—*Construed.*
   Section 14, chapter 100, Code 1891, does not apply to waste by joint tenant or tenant in common. (p 406).

3. COAL—*Co-Tenant—Accounting.*
   If one tenant in common take coal from land without the consent of another, he must account to that other therefor, and cannot keep the proceeds of the sale of the coal, without accounting, on the theory that the portion of land furnishing the coal is no more than his just share. (p. 407).

4. COAL—*Co-Tenant—Accounting.*
   If one tenant in common use the common land, and exclude his co-tenant, he is accountable to such co-tenant, though he does not take beyond his just share of rents and profits. (p. 408).

5. CO-TENANT—*Use—Profits.*
   If a tenant in common use the land for purposes allowable by law to a tenant in common, but use no more than his share, and do not exclude a co-tenant, he is not accountable to him for rents and profits. (pp. 407-408.

Appeal from Circuit Court, Summers County.

Actions by W. P. Cecil and others and J. R. Hall and others, respectively, against E. W. Clark and others, trustees of the Flat Top Coal-Land Association. Decree for plaintiffs, and defendants appeal.

Affirmed.

J. S. CLARK, and A. W REYNOLDS, for appellants.

S. L. FLOURNOY, W. MOLLOHAN, E. W. WILSON and JOHN OSBORNE, for appellees.

BRANNON, JUDGE:

As will be seen in 44 W. Va. 659, (30 S.E. 216), these cases have before been passed on in this Court. That decision settled that the tract of land involved in this litigation was held by tenancy in common by certain trustees, holding for the Flat Top Coal-Land Association, and Cecil and others, as heirs of Henley Chapman, and Sarah E. Torbett, as one of the heirs of Hall,—the trustees owning five and one-half tenths thereof; the Chapman heirs, four-tenths, and Mrs. Torbett, one-twentieth. The said trustees, claiming the entirety of the tract of land, and denying the Chapman and Hall heirs any right therein, took sole possession of the land, by leasing it for coal mining to the Elkhorn Coal and Coke Company and the Shamokin Coal and Coke Company; and said lessees established an extensive plant, and mined large quantities of coal, paying the said trustees, lessors, large sums of money as royalty,—amounting, it is claimed, to one hundred and thirty-five thousand four hundred and six dollars and twenty-seven cents, up to September 5, 1895, the date of the decree,—holding said land to be such common property and subject to such partition. The said decree, after declaring the shares of the parties in the land, directed an account to be taken of the moneys received by said trustees as royalties prior to the date of the decree; and, as to future royalties, it directed that said trustees pay into the Bank of Bramwell, to the credit of the causes, four-tenths and one-twentieth of all royalties accruing after September 5, 1895. At the instance of said trustees, the clause requiring such payment into bank was suspended on the execution of a bond by the Flat Top Coal-Land Company in the penalty of ten thousand dollars; and, said bond having been given, the said trustees continued to collect all the royalty. From the 5th of September, 1895, to April 9, 1898 (the later date being the date of the affirmance by this Court of the said decree), the four-tenths and one-twentieth of said royalties going to the Chapman heirs and Mrs. Torbett, collected between said dates, amounted to twenty-three thousand two hundred and sixty-seven dollars and forty-one cents. After the 9th of April, 1898, the royalty going to the Chapman heirs and Mrs. Torbett was paid into said bank, and

amounted on the 27th of January, 1899, to five thousand three hundred and thirty-five dollars and sixty-seven cents. On that date the court made a decree requiring the said bank to pay to a special receiver appointed by said decree (George E. Price) the said five thousand three hundred and thirty-five dollars and sixty-seven cents, as, also, eighty per cent. of any other sums which might thereafter be paid into said bank under said decree of September 5, 1895, and requiring said trustees of the Flat Top Coal-Land Association to pay over to said special receiver eighteen thousand two hundred and sixty-four dollars and forty-one cents, which, with five thousand dollars left in the hands of said trustees, to be thereafter disposed of, made up the twenty-three thousand two hundred and sixty-seven dollars and forty-one cents, collected by said trustees as aforesaid on account of the interests of the Chapman heirs and Mrs. Torbett in the royalties accruing between September 5, 1895, and April 9, 1898, as above stated. The said decree of the 27th of January, 1899, went on to direct that said special receiver pay out the said moneys to the Chapman heirs and Mrs. Torbett, thus finally adjudicating their right thereto against the said trustees for said land association. From this decree of January 27, 1899, the said trustees have taken this appeal. The moneys received by the said trustees prior to September 5, 1895, have not yet been disposed of by the circuit court, but await the coming in of the account of rents and profits directed by that decree to be taken. Further, by that decree commissioners were appointed to make a partition of the land between the said tenants in common according to their respective rights, directing them to assign to said trustees their share in such manner as to include in their share the portion or portions of the tract on which they had made improvements, if the same could be done without injury to the other owners; and, in case said portion of said tract embracing said improvements should be laid off to the trustees, the commissioners were directed not to take into the estimate of value any improvement placed thereon by the trustees, nor deduct from the value of the portion assigned to said trustees anything on account of the coal mined therefrom, but to estimate the value of such portion at

such sum as would be done if such portion of the tract had in it the coal so mined therefrom.

The appellants complain of the decree because it orders a distribution of any part of the royalties paid since September 5, 1895; claiming that the court should have held all of the royalties subject to its disposal until the coming in of the report of the partition commissioners, and the report of the commissioner in chancery as to rents, royalties, and improvements, as required by the decree of September 5, 1895. The trustees claim that as they took possession, and developed, by coal mining, certain parts of the land, they should be assigned their share of the land, so as to include the coal mines opened by them, and as this would not cover more than their share of the surface, and as all the coal sold by them came from that land, they should be allowed to retain the money from its sale, without accounting to the Chapman heirs and Mrs. Torbett for any part of that money, and that said heirs and Mrs. Torbett should be assigned their shares in the undeveloped land. The trustees base this position or claim on the well-established principle that, where one co-tenant has made improvements upon a part of the common land, such improvements should be included in the land allotted to him in the partition, if the land is partible, and it can be done without injury to the rights of others, and the further principle, held in *Dodson* v. *Hays*, 29 W. Va. 577, (2 S. E. 415), that when the nature of the property is such as to admit of its use by several, and less than his just share is used and occupied by one tenant in common in a manner which in no way hinders or excludes other tenants in common from in like manner using and occupying their shares, such tenant does not receive more than comes to his just share and proportion, within the meaning of section 14, chapter 100, of the Code, and is not accountable to his co-tenants for the profits of that portion of the property occupied by him. But does this case fall under that statute? The position mentioned would, on first impression, seem to be reasonable; but I repeat the question, does this case fall under that statute at all, or the decision in *Dodson* v. *Hays*? Instead of doing so, does it not fall under section 2, chapter 92, of the Code, saying that "if a tenant in common, joint tenant

or parcener commit waste, he shall be liable to his co-tenants jointly or severally for damages?" The other statute (section 14, chapter 100, Code) provides that "an action of account may be maintained * * * by one joint tenant in common against the other for receiving more than comes to his just share or proportion." These two sections are in the Code. They do not mean the same thing. We must give each its construction. Where one co-tenant occupies land for agricultural purposes in the production of yearly crops, *fructus industriales*, or other legitimate use for such a co-tenant, it is plainly just that he be allowed to do so without accounting to his co-tenant for such use, unless he occupies more than his share of the land; otherwise, he would not have the use of his share of the land. But, if he excludes his fellow from like enjoyment of his share, he must account to his co-tenant for that co-tenant's share, whether the occupation covers more or less than the share of the co-tenant so occupying. Or, if he occupies more than his share, though he does not exclude his co-tenant, thus not leaving open for his co-tenant that co-tenant's share for his enjoyment, he must account to him for taking more than his own just share of the profits. This liability to account did not exist at the common-law. Use as much as he might, however profitable, one co-tenant was not liable to account to another. But section 14, chapter 100, above quoted, changes this, by making him account for what is beyond his just share, to his fellow. Its only purpose is to change the common-law rule of nonaccountability as to the ordinary use of the common property which a co-tenant may legitimately make of it. Such legitimate use contemplated by that section does not waste the property by damaging the inheritance permanently, but leaves it, after such use, intact, uninjured, ready for partition, as before such use. That statute only says that if one co-tenant, by such lawful use for ordinary purposes, get more than his fair share, he shall account for the excess to him entitled to the excess. Such construction of this statute was given in *Williamson*, v. *Jones*, 43 W. Va. 562, (27 S. E. 411), and *Ward* v. *Ward's Heirs*, 40 W. Va. 611, (21 S. E. 746). But that statute does not apply to this case. If it did, the posi-

tion of the trustees would be tenable, as it is clear that the trustees did not take coal from a greater quantity of land than their interest would call for; but that statute does not touch this case, since it relates to rents and profits only in ordinary cultivation or other use authorized by law to one tenant in common, while we are dealing with unauthorized use,—with what is waste. Coal in place is a mineral, and part of the very substance of the land. As shown in *Williamson* v. *Jones*. 43 W. Va. 562, (27 S. E. 411), and 2 Am & Eng. Dec. Eq. 670, taking from the land any mineral by a tenant in common is waste, for which he must account to his co-tenant. He is liable under section 2, chapter 92, of the Code, above quoted. That deals with waste by a tenant in common; changing the common law, which did not make him liable therefor. 2 Minor, Inst. 429. The difference lies in the light in which the law views the act of production in the use of the common property,—we may say, in the article produced. Where one tenant in common takes wheat or apples, even in excess of his share, the law regards him as its sole owner; his co-tenant having no title therein, though the producing tenant is accountable for taking more than his just share. But when one takes coal his co-tenant has title to the very coal, after its severance from the land; and the taking tenant can be sued in trespass, or if he sells, his co-tenant can waive the tort, and sue for the money had and received, because the one has received money from the sale of property belonging to the other. When the one took the grain he did so with lawful authority, as he was entitled to occupy the land for the production of grain. But when he took the coal he did so without authority. His act was a wrong, a waste, in violation of the right of his co-tenant; and this co-tenant can follow up the property, and base his demand on its wrongful taking and conversion. The distinction is that one is waste, falling under a statute declaring, without qualification, that he who commits it shall answer, without any reference to whether he took more than his share or not, while the other is not waste, but authorized use, rendering him accountable, by the letter of the statute, only in case he takes more than his share. It does not seem that in cases in Virginia where tenants in common took salt water, lead, or iron ore,

it was contended that they could keep all their proceeds, without account to their fellows, on the theory that what was taken was no more than their fair share, or that it came from the land assigned to them. *Ruffners* v. *Lewis' Ex'rs.* 7 Leigh, 720; *Early* v. *Friend*, 16 Grat. 21; *Graham* v. *Pierce*, 19 Grat. 28; *Newman* v. *Newman*, 27 Grat. 714.

As to the point made by counsel, that the bill does not charge waste, or go on that theory, I have to say that it does so in a legal point of view. It charges common ownership, and charges that the trustees took coal from the land; and that in law constitutes waste, and relief would come under the praver of general relief.

Another reason against allowing the trustees to keep all the money arising from the coal, without accounting to their co-tenants, on the theory that the trustees took no more than their lawful share, is that the trustees denied all title in the Chapman and Hall heirs, took sole possession, and excluded them from the land. Those trustees cannot say, or have the benefit of the theory, that they did not exclude the Chapmans and Halls, as they did not even concede their right when the Chapmans and Halls demanded a share in the land, but defended that suit through all the courts till the right of their adversaries was established. Therefore, if the taking of the coal is viewed, not as waste, but in the light of ordinary use for agriculture, and thus coming under section 14, chapter 100, of the Code, still the trustees must account, though they took less than their share, because of their exclusion of their co-owners. *Early* v. *Friend*, 16 Grat. 21, (Syl., point 2); *Rust* v. *Rust*, 17 W. Va. 901.

But the trustees, conceding for the moment that the case does not fall under chapter 100, section 14, and taking coal is waste, would fall back on a supposed general principle of equity, and say: "We have not occupied more land in mining than our share. All the coal taken by us came from the land occupied and improved by us, and, as that land can and should be assigned to us in the partition, we consequently ought to keep the proceeds of the coal, without accounting for it to the Chapman heirs and Torbett; and they should be compelled to take their share in undeveloped land, with its coal, which they may mine if

they choose." This does seem to be a strong proposition, but second thought presents a counter consideration overthrowing its force. If the trustees keep all the money, they keep money actually realized from coal from a given area of land,—a certainty. The Chapman heirs and Torbett have to look to a like quantity of land for a like quantity of coal, producing an equal amount of money,—an uncertainty. Under this theory you call on equity to compel the Chapmans and Torbett to relinquish this money for what may not be realized. In the land undeveloped, which they would get, the coal may be less rich in quantity and quality. There is an element of hazard. In *Hall* v. *Vernon*, (decided this term) 34 S. E. 764, this court held that ownership in fee of natural gas and oil separate from the surface of the land is impartible, because gas and oil are fugacious, and no partition of them can be made, affording a reasonable guaranty of equality. While coal land, or only the coal in land, is more certain, and is partible, still there is an appreciable element of uncertainty touching it, great enough to forbid a court of equity from depriving a party of his right in what is in the land for what may never be there.

It is said that the trustees are entitled to keep the coal money because the decree of September 5, 1895, is *res judicata*, upon the question, and is violated by the decree of January 27, 1899. This calls upon us to construe the former decree. The clause above quoted from that decree directs the commissioners of partition to assign to the trustees their land, so as to include the land which they mined, if the same can be done without injury to other owners,, and, in case the mined land shall be laid off to the trustees nothing should be deducted from the value of that land for coal mined therefrom, but that they shall estimate the value at such sum as would be done if the land had in it still the coal taken therefrom. The trustees say that this provision finally gives and compels them to take the land exhausted by mining, and consequently lets them keep the money arising from the coal royalties since it cannot be that the court intended to force the trustees to take exhausted land, without deducting the value of the coal mined, and also yield to the Chapmans and Torbett their

share of the money. Can it be that the court intended the trustees to keep the money? If so, why does the decree order an account to be taken of what money had been received from the sale of coal before that decree, unless it was to charge the trustees, in favor of their co-tenants, for their share of the money? Why the explicit expression of the opinion of the court in the decree as to money coming from coal sold after the decree that the chapman heirs and Torbett were entitled to shares therein? This opinion is expressed with an emphasis making it almost decretal in character. This opinion that the Chapman heirs and Torbett had specified interests in the moneys thereafter received is given as the reason for directing such moneys to be paid into the Bank of Bramwell by the lessees, by fractions corresponding to the shares of the Chapmans and Torbett therein. This negatives all idea that the court designed finally to adjudge that the trustees should retain all the money arising from the coal. If the court so designed, it would have allowed the trustees to continue to receive, as they had been doing, all the money, instead of allowing them to collect only their part thereof, and directing the part proper for Chapman and Torbertt to be paid into bank. Indeed, rather can it be said that the decree decided that the money which should be deposited in bank should, if not at once, yet ultimately, go to the Chapmans and Torbett, because deposited as their shares, only to await final decree. The decree discloses that the trustees asked the court to suspend that clause of the decree directing payment into bank, in order to allow them to apply for an appeal, and this may be the reason why such deposit was directed. At any rate, we cannot construe the decree as giving the money to the trustees. It does not actually decree the money at once to the Chapmans and Torbett, but it says by way of recital, if you can call it recital. "And the heirs of Henley Chapman and William H. Allen being entitled to four-tenths, Sarah E. Torbett the one-twentieth, of all royalties hereafter accruing;" and it directed the lessees to pay into bank, "to the credit of these causes, four-tenths and one-twentieth of all rents or royalties payable under said leases for coal, timber, and material taken from said tract from this day until the fur-

ther order of the court." As just stated, the decree does not purport to actually decree at once to the Chapmans and Torbett the money, but it repels the claim that the decree affirmatively holds that the trustees shall keep the money. The decree may not be said to establish beyond recall the right of the Chapmans and Torbett to the money, but it can be said that it repels any claim that it gave to the trustees that money irrevocably. Hence that clause is not violated by the subsequent decree actually directing the money to be paid to the Chapmans and Torbett. But is the clause of the decree directing the commissioners of partition to assign to the trustees the land which had been mined, without deduction from its value of the value of the coal taken from it, violated by the later decree? That provision is not final, either that the developed land should go to the trustees, or that it should go without deduction of the value of the coal mined therefrom. I understand that a decree for partition is final so far as it adjudicates the shares of the partitioners, but not as to the manner or mode of partition, or what land the parties shall severally take. That is for adjudication in the decree of final partition, and is not usual or practicable in the first decree, where a report of commissioners, or the ascertainment of facts dehors the record, is essential before final decree, as surely was the case in this instance. There could not possibly be a decree until after the commissioner's report. The clauses of the decree seem to be inconsistent; but that is no matter, if the decree be not *res judicata* upon the question in hand, for any error or inconsistency is then afterwards correctible. That clause directing the commissioners to include in the land assigned to the trustees the land which had been mined, without deduction for coal mined, but to estimate its value as if no coal had been mined, is not final, but merely tentative or experimental,—to be adopted or rejected as the court might thereafter determine. This must be so, from the nature of the decree; it being not one of actual partition, but only one for partition,—a decree preparatory to final actual partition. It is manifest such was the intent of the court, from the language that the land which had been mined should be assigned to the trustees "if the same can be done without in-

jury to the interests of other owners," and that, "in case said partition of said tract embracing said improvement shall be laid off to the trustees, the said commissioners shall not take into the estimate of its value any improvements placed thereon by said trustees, nor shall they deduct anything on account of the coal mined therefrom," etc.

It is hardly necessary to say that, as the Chapmans and Torbett have elected to participate in the money, the trustees cannot, in the partition, be given the exhausted land, without deduction of the coal taken from it. The Chapmans and Torbett cannot have their full proportionate share of the land, as if never mined, and money also. As to the argument that the court erred in giving the money to the Chapmans and Torbett prematurely, before the coming in of the reports of partition and of rents and profits: It is said that whether the trustees shall be deprived of this money depends on the final determination of the question, whether they took more than their just share, and that this can only be determined upon the final account; but we hold that their accountability does not depend on that, but on the fact of waste. Having determined that the money goes to the Chapmans and Torbett, why withhold it longer from them? A large sum is in the hands of the trustees, received before 5th of September, 1895, in which the Chapmans and Torbett have a share, under principles above given; and that money has not yet been disposed of or passed on by the circuit court. This money is adequate to meet any demands for management or improvements, if any be allowed, and especially adequate in view of the fact that the improvements are mostly trade fixtures put up by the lessees, and removable by them,—not belonging to the trustees, who receive net money for royalty. I see no reason for keeping the money passed on by the decree of January 27, 1899, any longer from the people entitled to it, seeing that it cannot be needed for any future purposes of the case.

As to the disposition of the moneys from royalties paid prior to 5th of September, 1895, or the mode of partition of the land: These subjects, not being before us, remain for the action of the circuit court, and we express no opinion

thereon, further than as the legal principles above given may apply thereto.

The trustees claim that, as the husband of Mrs. Torbett is living, she is not entitled to her share of the money until his death, and that said trustees are entitled to its interest until his death, and that the decree erred in giving her her share at once. The former decision by this Court settled that point in favor of the correctness of the subsequent decree as to it.

Affirmed.

CHARLESTON.

TOWN OF DAVIS *v.* FILLER *et al.*

Submitted September 12, 1899—Decided January 24, 1900.

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1. SUPERINTENDENT OF STREETS—*Office—Tenure.*
A superintendent of streets of a town holds at the pleasure of its council, and may be removed by it without cause shown, or charges, or notice. Its action, being discretionary, is not subject to review by courts. (p. 415).

2. OFFICER—*Appointment—Removal.*
The power to appoint an officer carries with it as an incident power to remove him, in the absence of restraint by consituation or statute. (p. 415).

3. OFFICER—*Removal Discretionary.*
Where the power of removal of officers is discretionary, the courts will not review such removal. (p. 415).

4. OFFICERS—*Removal—Cause.*
Where an officer holds during pleasure of the appointing power, he may be removed by it without assigned cause or notice, and the action is not reviewable by courts. (pp. 416-417.)

5. JURISDICTION—*Prohibihition—Town Council.*
The circuit court has no jurisdiction by prohibition to prohibit a town council from removing a superintendent of streets. (p. 417).

Application by the town of Davis against F. S. Filler and John Holt for a writ of prohibition.

Writ Awarded.

C. WOOD DAILEY, for petitioner.

CUNNINGHAM & STALLINGS, for respondents.

BRANNON, JUDGE:

Filler was appointed superintendent of streets—commonly called "commissioner of streets"—of the town of Davis, Tucker County, by its council, and later charges were made by the mayor and sergeant that he had refused to receive and work on the streets persons sentenced to such work by the mayor for violation of ordinances, and had refused to recognize the authority of, or have any intercourse with, the mayor. These charges were made by word of mouth in the council meeting, and entered informally in the order book. The council adopted a resolution reciting that Filler had refused to take charge of such prisoners, in violation of his duty under an ordinance, and declaring the position of street commmissioner vacant, and authorizing the mayor to employ persons to look after the street until the next council meeting. Filler then obtained from the circuit court a rule against the mayor, recorder, and councilmen to show cause why a writ of prohibition should not go against them to prohibit the enforcement of the order of the council declaring the street commissionership vacant, and to prohibit one King, who had been placed in charge of the streets, from interfering with Filler as street commissioner, or performing duties assigned him, and prohibiting the council from taking any further action or making interference with the discharge by Filler of the duties of street commissioner. Thereupon the town of Davis and its mayor, recorder, and councilmen presented a petition to a judge of this Court, and obtained a rule against the circuit court and its judge to show cause why a writ of prohibition should not issue to prohibit said circuit court from taking jurisdiction of or making any order in the said prohibition proceeding in said circuit court. Had the circuit court jurisdiction of the proceeding in prohibition? The answer to this question

solves the case. If it has not jurisdiction, it should be prohibited from going on by writ of prohibition from this Court; otherwise not. The answer to this question depends on the further question, had the council of Davis jurisdiction and power to remove Filler? If it had, then the circuit court could not restrain its action by the writ of prohibition; for, if it had jurisdiction to act upon the matter, any mere error of procedure must be remedied by *certiorari*. Then, had the council jurisdiction of the subject of the retention or removal of Filler? I answer promptly, "Yes," both from public policy and law. If a street commissioner,—a mere appointee of a municipal corporation; I may say, for this purpose, a mere employe,—is to have a fixed tenure for a fixed term, without power in the council to remove him, it would cramp the powers of the town, defeat the performance of some of its essential functions, and be very hurtful to public interests. Public policy overrules that contention. But how as to law? This town exists under chapter 47, Code 1891. Section 15 provides that a superintendent of roads, streets and alleys shall be appointed by council, "to continue in office during its pleasure." I might stop here, as that settles the controversy; but, if the power of removal were not given by the Code, it would exist, because the power to appoint carries with it as an incident the power to remove, in the absence of constitutional or statutory restraint of such power. It is called by the United States Supreme Court, as it is, "a sound and necessary rule." *Hennen's Cases*, 13 Pet. 230, 10 L. Ed. 138. Much authority sustains it. Mechem, Pub. Off. § 445. "Where the power of appointment is conferred in general terms, without restriction, the power of removal in the discretion and at the will of the appointing power is implied, and always exists, unless restrained and limited by some provision of law." *Trainor* v. *Board.* (Mich). 15 L. R. A. 95, note) s. c. 50 N. W. 809.) Now, with pointed respect to municipal officers, Dill. Mun. Corp. § 240, says that, "from the reason of the thing, from the nature of corporations, and for the sake of order and government, the power is incidental." *Richards* v. *Clarksburg*, 30 W. Va. 491 (4 S. E. 774), holds that "power to remove a corporate officer is one of the com-

mon-law incidents of all corporations." There it was held that this incidental power warranted removal of a mayor. This power is supported by *Hunter* v. *Trustees* (decided this term) 34 S. E. 729. This power being discretionary, the tenure being "at the pleasure" of the council, its action is not subject to review by the courts.

It is pointed out that Code, chapter 47, section 16, gives town officers a fixed term of one year, and there is authority to say that, where such is the case, generally there is no absolute power of removal,—only for cause. Throop, Pub. Off. § 354. But this is not our case. We must read both sections of the Code and harmonize them. One says that the officers shall hold at the pleasure of the council; the other fixes the term. The two together mean that the officers shall hold for that term, unless it is the pleasure of the council to order otherwise. "A statute may give a council power to remove officers at pleasure, though the terms are for a specified time." *City of Madison* v. *Corbly*, 32 Ind. 74.

But it is urged that Filler was removed without charges filed in writing, or notice to him, arbitrarily, and that a town ordinance required charges in writing, and a report of a committee thereon. It required no notice. If the street commissioner is an officer, and not a mere employe, not entitled to such charges, this would be only error in proceedure, not ousting the council of jurisdiction to act, and correctible by *certiorari*, which is a writ to correct error of procedure in an inferior tribunal or board having jurisdiction, and not by prohibition, which is predicated on want of jurisdiction. *County Court* v. *Boreman*, 34 W. Va. 362 (12 S. E. 490); *Fleming* v. *Commissioners*, 31 W. Va. 608 (8 S. E. 267) (Syl., point 6). But I think that ordinance only directory; proper and just to be followed, but not mandatory, so that failure to follow it vitiates the proceedings, and makes it either void or voidable. As the Code gives power of removal at pleasure of the council, I do not think this mere ordinance could affect the action of the council acting under the authority of the statute, a law superior to the ordinance. I do not think such an error could reverse its action even upon *certiorari*. In fact, I think action of council in such a matter not re-

viewable by a court; yet I do not approve the practice of giving no chance to be heard. However, I can readily see how the council may often be called upon to act very promptly. Where a statute authorzed removal for incompetency, no charges were required, or notice given. *Trainor* v. *Board* (Mich.) 50 N. W. 809, 15 L. R. A. 95. "Removal of appointed officers at the will or caprice of the appointing power is not unconstitutional, in the absence of any provision to the contrary." *Id.* "A town clerk during pleasure is removable without cause shown." "So is a town councilman appointed during pleasure." *Id.*, 15 L. R. A. 96, note (s. c. 50 N. W. 809). JUDGE WOODS, said, in *Richards* v. *Clarksburg*, 30 W. Va. 501 (4 S. E. 780), that, if an officer is a ministerial one,—as, surely, Filler was,—"holding during pleasure, he may generally be removed without notice or trial." It would be a costly consumption of time and money to require a council to have an impeachment trial over its mere appointees, who are not officers in the legal sense, but mere employes, as shown in *Trainor* v. *Board* (Mich.) 50 N. W. 809, 15 L. R. A. 97. See *Burr* v. *McDonald*, 3 Grat. 215, holding officers of a joint-stock corporation to have no franchise in their offices, but mere ministerial agents to conduct its business. "Where an appointment is during pleasure, or power of removal is discretionary entirely, there the will of the appointing or removing power is without control, and no reason can be asked for, nor is it necessary that any cause be assigned." Throop, Pub. Off. § 361; 1 Dill. Mun. Corp. § 250. "Nor will courts review the action where the removing body is vested with discretion." Throop, Pub. Off. § 394. Being of opinion that the circuit court has no jurisdiction in the premises, the writ of prohibition is awarded.

Writ Awarded.

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CHARLESTON.

ZANHIZER *et al. v.* HEFNER *et al.*

Submitted September 14, 1899,— Decided January 24, 1900.

1. CONVEYANCE—*Chattel Mortgage—Record.*
A conveyance of goods and chattels, absolute on its face, but in reality made to secure a debt, is in equity a mortgage, and, to be good as to creditors, must be recorded. (p. 421.)

2. INJUNCTION—*Sale—Chattels—Damages.*
An injunction will not lie against the sale of goods and chattels attached, claimed by a third party, unless they are of peculiar value to the owner, and it is clearly shown and manifestly appears that great injury would result to the owner from consequential damages from the sale, because the owner has complete and adequate remedy at law (p. 419.)

3. ATTACHMENTS—*Multiplicity—Suits—Parties.*
The fact that attachments by four distinct creditors are levied on goods of a common debtor, they having no connection, will not give a third party, claiming the goods, an injunction on the ground of preventing multiplicity of suits. (p. 420.)

Appeal from Circuit Court, Braxton County.

Bill by Zanhizer Bros. & Sten against J. B. Hefner and others. Decree for plaintiffs, and defendants appeal.

Reversed.

DULIN & HALL, for appellants.

JOHN B. MORRISON, for appellees.

BRANNON, JUDGE:

Hefner, Tully, Rudkin, and Carney each brought an action before a justice of Braxton County for the recovery of debts against Sam and George Holmes, called "Holmes Bros.," and sued out attachments against the estate of the defendants as nonresidents, and levied the same on some tools and material used for boring oil wells, and judgments having been rendered for the plaintiffs in the four actions, and orders of sale having been issued to sell the property,

Zanhizer Bros. & Sten filed a bill in chancery, claiming the property as theirs, and not liable for the debts aforesaid, and obtained an injunction against its sale. The defendants demurred and answered. The result was a decree overruling a demurrer and motion to dissolve the injunction, perpetuating the injunction, and an appeal by the defendants.

The position of the defendants is that equity has no jurisdiction, becuse of adequate remedy at law, and that the property belongs to Holmes Bros. That property was personal property. If Zanhizer Bros. & Sten were its owners, they had adequate remedy at law. They could sue to reclaim it by detinue against the officer or purchaser, or sue the attachment creditors or theofficer in trespass and recover its value. By Code 1891, chapter 50, sections 151, 152, 210, they could present their claim to the justice, and have their right tried, with appeal to the circuit court, and, if they sustained their claim, they would get the very property itself. By giving bond, they could use the property pending the contest, and without bond they could have the right of property tried. It would be no more burdensome to give that bond than an injunction bond. This remedy is very speedy, plain, and efficacious. As JUDGE GREEN said in *Baker* v. *Rinehard*, 11 W. Va. 238, this statutory remedy would forbid an appeal to equity. As held in that case, many decisions in Virginia binding on us hold, as did that case, that equity cannot enjoin the sale under execution of personal property claimed by a third party, when the property is not, from its nature, of peculiar value to its owner, and its sale will not greatly injure the owner by the consequential damage it would produce. That case expresses doubt whether the fact that consequential damage would alone give equity jurisdiction, thus making it rest on pecularity in the character of the property. This doctrine is repeated in *White* v. *Stender*, 24 W. Va. 615. It is a firm rule, under many decisions, in the Virginias. It is hard to allow equity jurisdiction, under their decisions, in such cases. It must be very plainly shown, under the particular circumstances, that the property is of very peculiar character, and that the consequential damage would entail irreparable injury. I incline to admit that, if a party

were actually engaged in boring an oil well, and the tools being used were levied on as the property of another, and great consequential damage would result from sale, equity would intervene. The bill charges irreparable injury to ensue from the sale, the answer denies it, and there is no proof of it. They were not boring a well. It had been bored without result, and abandoned. Tools for oil wells are easily bought. They possess no peculiar quality in themselves.

Jurisdiction cannot be rested on the theory of prevention of multiplicity of suits. The fact that four creditors sue their debtor on separate debts cannot give jurisdiction. There is no complication in such case, though there may be some inconvenience; but it is not anything more than inconvenience of several trials, not inadequacy of the legal remedy. "Injunction for prevention of multiplicity of suits is allowed only when the subject-matter of the various litigations as well as the parties, are substantially the same. And the fact that different suits have been brought, each having a distinct object, founded on distinct and separate grounds, brought by different persons, does not constitute such a multiplicity of suits to bring the case within the rule and warrant an injunction." *Haines* v. *Carpenter*, 91 U. S. 254, 23 L. Ed. 345; High, Inj. § 65. In that case Justice Bradley said that three suits were not enough to give chancery jurisdiction. In this case all are interested only in the question of title, not at all otherwise; and Pom. Eq. Jur. § 268, says that, to give jurisdiction to prevent multiplicity of suits, there must be a common right, and "it is not enough that, the claims of each individual being separate and distinct, there is a community of interest merely in the question of law or fact involved, or in the kind or form of remedy demanded." In this case these creditors are all interested in the mere question of the right of property, but they have no common right, no connection with each other, and the judgment in one of their suits has no legal effect upon another. They are interested only in a question, not in result, as having the force of adjudication.

But what if there were jurisdiction in equity? The claim of the plaintiffs fails on the merits. They do not

own the property. They have a deed for it absolute on its face, but made to secure a debt. The deed was not recorded. Though a conveyance of goods and chattels need not be recorded, yet, if it is in fact to secure a debt, though absolute on its face, it is void unless recorded; and this deed is void as to these attaching creditors. *Poling* v. *Flanagan*, 41 W. Va. 191, (23 S. E. 685.) Zanhizer Bros. & Sten were manufacturers of oil-well tools in Pennsylvania. They admit that they sold these tools to Holmes Bros., in that state, and that Holmes Bros., as contractors for the boring of an oil well for Zanhizer Bros. & Sten, in that state, did use these tools in boring a well there. This is a strong circumstance to show the probability that the deed subsequently made for these tools by Holmes Bros. to Zanhizer Bros. & Sten was in fact only to secure a continuing debt. Zanhizer Bros. & Sten claim that this debt was never paid, except by the retransfer of the tools. When Zanhizer Bros. & Sten determined to bore for oil in Braxton County, and contracted with Holmes Bros. to bore for them with these tools, that deed was made in Pennsylvania, probably only to better secure the debt, as the tools were to go into another state. I say this looks plausible. It is fully proven that the universal rule in the oil business is that where a well is bored by contractors, the contractors furnish the tools. After the execution of that deed, when the parties were embarking in the oil business in Braxton County, these tools were shipped to that county, to be used by Holmes Bros. in boring a well at Burnsville for Zanhizer Bros. The tools were consigned to the name of Holmes Bros. The engine, boiler, and casing belonged and were consigned to Zanhizer Bros. & Sten. Why were not the tools consigned to them also, if they owned the tools under that deed? The evidence is that the party owning the well furnishes casing, engine, and boiler, the contractor the tools. When Zanhizer Bros. & Sten were asked to pay for hauling the tools from the station to the well site, they refused, saying they owned and would pay for hauling casing, boiler, and engine, but Holmes Bros. must pay for hauling the tools. V. O. Zanhizer, one of the firm, wrote a letter to Hefner, who presented the bill for haulage directing Hefner to make out separate bills,—

one against Zanhizer Bros. & Sten for hauling boiler, engine, and casing, and a separate bill against Holmes Bros. for hauling the tools. Zanhizer, as a witness admitted that it was usual for the contractor to pay for hauling tools only when he owned them. If their firm owned them, why should Holmes Bros. pay for hauling their tools? A. J. Zanhizer, of the firm, as a witness, was asked whether the deed from Holmes Bros. to Zanhizer Bros. & Sten for the tools was not given to secure the firm the debt for their purchase money, and he answered pointedly, "It was." What more evidence could be asked? But there is much more. A. J. Zanhizer told J. B. Hefner that he had a purchase-money lien on the tools. This was after the attachments. At another time he told M. W. Hefner that he had such lien on the tools. V. O. Zanhizer made an important statement to Knight after the well had been finished. Knight said to him, that, if they did not wish to drill another well, he would find a man to buy the material, and bore another well; whereupon Zanhizer said that, if Holmes Bros., would still carry their interest, they would drill another well. Why say that Holmes Bros. had an interest, if they did not own the tools? But, in fact, this is not merely a fair inference from what Zanhizer said; for he went on to say that Zanhizer Bros. & Sten owned boiler, engine, and casing, and Holmes Bros. the tools. He also said, as to the well which had been bored, that Holmes Bros. were to furnish the tools and bore the well for one thousand two hundred dollars, and an eighth interest, and he wanted to give them work, because they owed Zanhizer Bros. & Sten. Owed for what? No other debt is shown but that for the tools. He said, further, that if they did not again bore, they would sell the boiler, engine, and casing cheap. He was asked, as a witness, if he had this conversation, and answered: "I might have had a conversation of that kind, but do not remember what I said. I did not tell him we owned the boiler, engine, and casing simply, and did not tell him we owned the tools simply." He said he was only in fun. When he returned after the dinner recess to the stand, he was asked what he meant by saying, before dinner, that he was in fun, and replied: "I meant that, if I did offer to sell Knight any machinery and tools,

it was only by way of joke, as Knight was not in the business or able to buy." Knight did not represent Zanhizer as offering to sell the tools, as Knight said that Zanhizer stated that they belonged to Holmes Bros. Knight did not represent that he himself would purchase, but that he would find a man able to buy. This seems to me to be equivocation or unfrankness on Zanhizer's part. He admitted that the tools had been shipped to Holmes Bros. from Pennsylvania after that deed, and the boiler, engine, and casing to Zanhizer Bros. & Sten, though he says that he told Holmes Bros. to ship them in the name of Zanhizer Bros. & Sten. If so, and the goods belonged to Zanhizer Bros. & Sten, it is not probable that they would have been shipped to the name of Holmes Bros. This is not all. V. O. Zanhizer told the two Hefners, on different occasions, that his firm owned boiler, engine, and casing, and Holmes Bros. the tools. Further, A. J. Zanhizer distinctly told Rudkin that the tools belonged to Holmes Bros. This volume of evidence, as well as the circumstances of the transaction,—all its features,—all show clearly that Holmes Bros. owned the tools, and that their transfer of them to Zanhizer Bros. & Sten was only a mortgage to secure a debt, if that debt still exists. *Shank* v. *Groff*, 43 W. Va. 337, (27 S. E. 340). Holmes Bros. at one time owed Zanhizer Bros. & Sten a debt. Holmes Bros. did a large amount of work, which we would suppose paid that debt. We have no evidence from Holmes Bros. as to this. Their evidence is not in the case. Where did their work go, if not to pay this debt? Is it probable that two wells would be bored, and the debt remain unpaid? If their late claim as to that deed being an absolute sale were true, why did they not take the depositions of the Holmeses? Why did they not record the deed? But, if a debt is yet unpaid, it is not material, as the deed is void as to these just creditors. If Zanhizer Bros. & Sten lose anything, who but themselves is to blame? They brought Holmes Bros. from abroad, shipped the tools to their name, refused to pay haulage for them, saying and writing that Holmes Bros. should pay haulage of the tools, and themselves that of boiler, etc , and holding out to the people that Holmes Bros. owned the tools, and letting Holmes Bros. represent

to the people that they owned the tools; and Zanhizer Bros. & Sten keeping that deed hidden in their pocket, until the people had extended credit to these strangers on the faith, inspired by these many circumstances, that Holmes Bros. owned the tools. How could these creditors form any other conclusion? Zanhizer Bros. & Sten are to blame, and innocent creditors ought not to suffer for their fault. In fact, the mere conduct of Zanhizer Bros. & Sten, even if their ownership were absolute, is perhaps enough alone to work an estoppel in equity against their claiming to the prejudice of creditors, aside from other points above given, controling the case in favor of the creditors.

I have not considered as entering into the case the many declarations of Holmes Bros. to people that they owned the tools, because, generally, declarations of a grantor, made subsequently to his conveyance, derogating from the rights of his grantee, are not admissible. *Casto* v. *Fry*, 33 W. Va. 449, (10 S. E. 799); *Crothers' Adm'r* v. *Crothers*, 40 W. Va. 169, (20 S. E. 927). Some question might be made whether that exclusion is applicable in this case, under the rule that declarations of a party in possession, explanatory thereof, are competent. *High's Heirs* v. *Pancake*, 42 W. Va. 602, (26 S. E. 536). But I do not consider such declarations of Holmes Bros. competent for all the purposes of the case, yet I do consider them competent for the purpose of showing that the Zanhizers being in that neighborhood, so that they likely would hear of such declarations, yet allowed them to go undisputed, and themselves made declarations confirmatory thereof. In other words, the declarations of Holmes Bros. are competent only as a circumstance, with others, to establish an estoppel from conduct against Zanhizer Bros. & Sten in favor of the creditors. Decree reversed, and bill dismissed.

Reversed.

CHARLESTON.

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BENNETT v. PERKINS.

Submitted September 14, 1899—Decided January 24, 1900.

1. NON ASSUMPSIT—*Special Plea—Evidence.*
   It is not error to reject a special plea setting up matter in defense to the action, when the plea of *non assumpsit* is filed, and the matter of defense of such plea may be given in evidence under the plea of *non assumpsit.* (p. 429.)

2. EVIDENCE—*Demurrer—Issue.*
   Either party has a right to demur to the evidence, but the demurrer is only applicable to the evidence of the party holding the affirmative of the issue. (p. 430.)

3. DEMURRER—*Evidence—Burden.*
   Where a plaintiff demurs to the evidence of the defendant when the burden of proof is not on the defendant, and such demurrer is erroneously entertained by the court, it is not reversible error if the facts be found for the defendant. (pp. 431-432.)

Error to Circuit Court, Braxton County.

Action by Nelson M. Bennett against Franklin Perkins. Judgment for plaintiff, and defendant appeals.

Reversed.

DULIN & HALL, for plaintiff in erorr.

LYNNE & BYRNE, for defendant in error.

McWHORTER, PERSIDENT:

This is an action of *assumpsit*, brought December 18, 1893, in the circuit court of Braxton County, by Nelson M. Bennett, survivor of himself and M. T. Frame, deceased, against Franklin Perkins, survivor of himself and Elijah Perkins, deceased, upon the following contract in writing, to wit:

"For value received, We, or either of us, promise to pay M. T. Frame & N. M. Bennett the sum of three hundred

dollars, with interest from date, when they shall have succeeded in releasing the lands sold by Elijah Perkins to Franklin Perkins, situate on Perkins Fork of Cedar Creek, in Braxton County, consisting of two tracts, from the lien of the judgment of P. B. Adams, commissioner, against Elijah Perkins and others, which is the subject of a chancery suit now pending in the circuit court of Braxton County in name of said Adams, commissioner, against said Elijah Perkins and others. But, in the event they fail to succeed in releasing both of said tracts from the said lien, and shall relieve from liability the tract of ---— acres, on which said Franklin Perkins now lives, then, and in that event, we agree to pay said Frame & Bennett the one-half of the said sum of three hundred dollars, and interest thereon as aforesaid. Witness the following signatures, this 11th day of December, 1883.

"FRANKLIN PERKINS,"
his
"ELIJAH x PERKINS."
mark

The defendant appeared on the 24th of April, 1894, and tendered two pleas in writing, marked, respectively, "No. 1" and "No. 2." No. 1, being simply the general issue of *non assumpsit*, was filed, and replication thereto. Plaintiff objected to the filing of plea No. 2, and the court took time to consider of said motion, and, on motion of defendant, Albert Shock, surveyor of said county, was directed to go upon the lands mentioned in plaintiff's declaration, and referred to in the contract sued upon, and any adjoining lands thereto, and do such surveying as either party might demand or require, and report same to the court, with a plat and seven copies thereof; and on the 22d of August, 1895, the defendant tendered plea No. 3, to the filing of which plaintiff objected, which objection the court overruled, and the plea was filed, and plaintiff replied generally thereto, and the court, having considered the objection to the filing of plea No. 2, theretofore tendered, sustained the objection, and rejected the plea; to which rulings of the court defendant excepted. A jury was then impaneled, and, having heard all the evidence, on the 23d day of August, 1895, the plaintiff filed a demurrer to the evidence of

the defendant, and the defendant objected to joining in said demurrer, but the court required him to do so. The defendant then filed his joinder in the demurrer, and the jurors were told to inquire what damages plaintiff had sustained by reason of the matters shown by him in evidence in case judgment should be given for plaintiff upon said evidence, and the jury assessed the plaintiff's damages at five hundred and ten dollars and sixty-five cents, but, subject to the opinion of the court upon said demurrer to the evidence, if the opinion of the court should be for the defendant, then their verdict was for the defendant. Plea No. 3, aforesaid, was a plea of statute of limitations of ten years, and the court took time to consider of its judgment. On the 10th day of May, 1898, the court, having maturely considered the matters arising upon the demurrer of plaintiff to defendant's evidence, was of opinion that the law was for the plaintiff, and rendered judgment for the plaintiff for the amount found for him by the verdict of the jury. The defendant excepted to various rulings of the court, and presented five bills of exceptions, numbered one, two, three, four and five, which were signed, and made a part of the record. Defendant obtained a writ of error, assigning it was error to reject plea No. 2, as set out in bill of exceptions No. 1, which plea is as follows: "The defendant, in his proper person, comes, and for plea says that he and Elijah Perkins, now deceased, executed the writing in the said declaration mentioned, dated the 11th day of December, 1883; that prior to and at the time of the making of the said writing there was pending in this court a suit in chancery of P. B. Adams, commissioner, against Elijah Perkins and others, the object of which was to enforce a judgment of said Adams as commissioner and other judgments against the real estate of said Elijah Perkins, including the two tracts of land mentioned in plaintiff's declaration, and there had been a decree entered in said cause for the sale of certain lands of Elijah Perkins, including a portion of said fifty-eight and one-half acres; that said lands were sold under said decree, and said sale was confirmed by the decree therein, and the said Elijah Perkins and this defendant employed M. T. Frame and plaintiff and other attorneys to institute a proceeding in

said court against said Adams and others to set aside said decree, and release the lands of Elijah Perkins, and the two tracts aforesaid, from the lien of the judgment named in said writing; that accordingly such suit was instituted, prosecuted, to a final hearing, and was dismissed at the cost of said Elijah Perkins, and said decree was not set aside, and the status of said judgments as to lands was the same as when said suit was instituted and when said writing was executed; that the tracts of land referred to in said writing, and described in said declaration as containing four hundred and thirty-seven acres and fifty-eight and one-half acres, respectively, were, by the terms of said writing, to be released from a lien of the judgment mentioned therein, before any liability would attach thereunder to this defendant or Elijah Perkins, except that, in the event the tract of four hundred and thirty-seven acres should be relieved from the liability of said judgment, then this defendant would be liable to pay plaintiff the one-half of the three hundred dollars named in said writing, but, if both tracts of land were not relieved, or the tract of four hundred and thirty-seven acres was not released from the lien of said judgment, no liability would attach to this defendant under said writing. And this defendant avers that neither plaintiff nor M. T. Frame has performed the conditions on their part in said writing mentioned a part; that the tract described in said declaration as containing fifty-eight and one-half acres was sold under decree in the chancery cause mentioned in said writing to satisfy said judgment, but did not bring sufficient amount to pay the same; that said chancery cause is still pending in this court, and neither of said tracts of land have ever been released from said judgment, as provided in said writing, and that neither the plaintiff nor M. T. Frame has ever performed any services or done any act under or in pursuance of said writing towards or tending to release the tract of four hundred and thirty-seven acres from the liability of the judgment mentioned in said writing, by which this defendant or Elijah Perkins was or is in any wise benefitted, and the consideration for said writing has wholly failed, and this the said defendant is ready to verify. Franklin Perkins, by Counsel,"—which plea was duly verified. There is no

defense set up in this plea which, if sufficiently pleaded might not be proved under the plea of *non assumpsit*, which had already been filed when this plea was rejected; hence the defendant was not prejudiced by its rejection. In *Hale* v. *Land Co.*, 11 W. Va. 229, it is held "not error to reject a special plea setting up matter in defense to the action, when the plea of *non assumpsit* is filed; and the matter of defense of such plea may be given in evidence under the plea of *non assumpsit.*" *Railroad Co.* v. *Laffertys*, 14 Grat. 478; *Railroad Co.* v. *Polly*, *Id.* 454; *Dillon Beebe's Son* v. *Eakle*, 43 W. Va. 502, (27 S. E. 214).

The second assignment alleges that it was error to permit counsel for plaintiff to ask plaintiff as a witness, as set out in bill of exceptions No. 2: "Do you know who has been in possession of the two tracts of land mentioned in these deeds? I mean since the execution of this contract," —to which witness answered: "Mr. Franklin Perkins did reside on the four hundred and thirty-seven acres, and has since, down until a year or two or three. He has moved lower down, where his father formerly lived. The fifty-eight and one-half acres has also been in his possession, as I understand it." The fact of continued possession was attempted to be shown as a circumstance, only, favorable to the contention of plaintiff. Surely, if defendant had been ousted from the premises as a result of the enforcement of the judgment which plaintiff had contracted to defend against or threatened with ouster or trouble therefrom, the defendant would be entitled to prove such fact in defense of plaintiff's action, and plaintiff was entitled to prove any fact tending to show the fulfillment of the contract on his part.

The third assignment alleges that it was error to overrule defendant's motion to exclude plaintiff's evidence, as set out in bill of exceptions No. 3, whereby it appears that, after plaintiff had introduced all his evidence in chief, and rested his case, and before defendant had introduced any evidence, defendant moved to exclude the evidence of the plaintiff. In *Carrico* v. *Railway Co.*, 35 W. Va. 389, (14 S. E. 12,) (Syl., point 3): "A motion by the defendant to exclude the plaintiff's evidence upon the ground that it is not sufficient to warrant a verdict in his favor, will not be

granted if there be any evidence which tends in any degree, however slight, to prove the plaintiff's case. If it tend to prove the plaintiff's case in any degree whatever, the case cannot be withdrawn from the jury. The motion can never prevail or be sustained merely because the court may think the weight of evidence is against the plaintiff." Defendant seems to have abandoned the third assignment, as he fails to make any mention of or reference to it in his brief. And further, in *Poling* v. *Railroad Co.*, 38 W. Va. 645, (18 S. E. 379), 24 L. R. A. 215. (Syl., point 6): "A defendant who, after the plaintiff has given in his evidence in chief, and rests, moves the court to instruct the jury to render a verdict for the defendant, but, the motion being overruled, goes on with his case, will be held to have waived his exception taken to such ruling."

"Fourth. It was error for the court to require defendant to join in plaintiff's demurrer to the evidence," as set out in bill of exceptions No. 4; and, fifth, "It was error to render judgment, on the demurrer to the evidence, for plaintiff." The contract sued upon here was for the payment to plaintiff of the sum of three hundred dollars in case he succeeded in relieving or releasing two certain tracts of land from the lien of a judgment which endangered it. If he was wholly successful he was to be paid the three hundred dollars, with interest, but, in the event he should fail to release both of said tracts from said lien, and should relieve from liability the one tract on which said defendant then lived, then he was to be paid the one-half of said sum. The burden of proof was upon the plaintiff to show to the satisfaction of the jury that he had performed his part of the contract, and was entitled to recover the three hundred dollars, or the one-half thereof, as the case might be. Counsel for plaintiff contend that either party may demur to the evidence, and cite *Insurance Co.* v. *Wilson*, 29 W. Va. 528, (2 S. E. 888); *Shaw* v. *County Court*, 30 W. Va. 488, (4 S. E. 439), and *Arnold* v. *Bunnell*, 42 W. Va. 479, (26 S. E. 359), in support of their contention, and this is true, with certain restrictions. 6 Enc. Pl. & Prac. 440, says: "Either party has a right to demur to the evidence, but the demurrer is only applicable to the evidence of the party holding the affirmative of the issue." In

Pickel v. *Isgrigg*, (C. C.) 6 Fed. 676, it is held: "The evidence of a party upon the affirmative side of an issue of fact before a jury may be demurred to by the adverse party under certain conditions; but the party upon whom the burden of proof of the issue rests is not permitted to demur to the evidence of the other party, for he cannot be allowed to assume that he has made out his case." So, in *Styles* v. *Inman*, 55 Miss. 469, (Syl., point 8): "A demurrer may be taken to the evidence of either party, plaintiff or defendant, holding the affirmative of the issue." While it has not been held, in so many words, by this Court, that the evidence of the party not having the burden of proof cannot be demurred to, yet it has so held by implication. In *Bank* v. *Evans*, 9 W. Va. 373, (Syl., point 7): "The defendant ought to be compelled to join in a demurrer to evidence when the burden of proof is upon him, unless the case is clearly against the plaintiff, or the court doubts what facts should be reasonably inferred from the evidence." What is the plain inference here but that, if the burden of proof is not upon the defendant, he should not be required to join in the demurrer. To a jury of his peers the defendant as well as the plaintiff has a right, under the Constitution of the United States, and of this State, to submit all questions of fact in issue in actions at law. Article VII. of the former instrument provides that: "In suits at common law, when the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law;" and our State Constitution (Article III., § 13) makes the same provision; and, when a defendant submits his facts in evidence before a jury impaneled to try the issue made in the case, and the same tend in any degree, however slight, to contradict plaintiff's evidence, or to prove failure on the part of plaintiff to comply with his contract, the right to have such evidence weighed and considered by the jury is guaranteed to him, and he cannot be deprived of this right by the court withdrawing the case from the jury, the constituted triors of the issues of fact, and itself weigh the evidence, and decide which party succeeds on the issue. If either party

has an absolute right, whether the *onus probandi* was upon him or not, to demur to the evidence, and force his adversary to join therein, then the right of trial by jury is at an end, and that which has ever been held by the American people as one of their most sacred rights, is a myth. The rule is that he who affirms a proposition must maintain it with sufficient evidence. The record shows the only thing plaintiff undertook to do, in which, if he had succeeded, the two tracts of land would have been released according to his undertaking in the contract sued upon; that is, the answer and cross bill filed for Elijah Perkins in the chancery cause of *Adams* v. *Perkins*, which was dismissed at the cost of Perkins, and the original bill filed for said Perkins against Adams, seeking the same relief which was asked for in the answer and cross bill, and which, on the hearing, was also dismissed at Perkins' cost,—thus failing in his efforts for the relief sought. Plaintiff, in his testimony on cross-examination, says: "At the very time in December, 1883, when this contract was entered into, Elijah Perkins arranged with us for the defense of that suit at the same time, and this contract was made at the same time; and the work and labor performed in the case of *Perkins* v. *Adams*, growing out of the *Adams* v. *Perkins case* was to the interest of Franklin Perkins, for, if Elijah Perkins had succeeded, that would have defeated the case, and it would have been as much in the interest of one as the other. It was consummated at the same time." The evidence of defendant shows, or tends to show, that twenty-four acres of the fifty-eight and one-half acre tract was sold under proceedings to enforce said judgment from the lien of which it was to be released under the contract. It is true it had been sold at the time the contract was made, but it was a case in which, under all the circumstances disclosed by the evidence, it was proper for the jury to ascertain whether the plaintiff should recover, and, if so, whether the whole or a part of the sum named in the contract, according to its terms. The fifth assignment—that it was error to render judgment for the plaintiff on the demurrer to the evidence—is, therefore, well taken.

The sixth assignment is that it was error not to render judgment for defendant on the demurrer to the evidence.

Although the plaintiff should not have been permitted to demur to the evidence, and thus withdraw the case from the jury, the proper triors of the facts, yet, having chosen to submit his case upon the law, and all the evidence in the case being included in the demurrer, in the consideration of the evidence by which the facts are to be ascertained "the party whose evidence is thus withdrawn from its proper forum is entitled to have it most benignly interpreted by the substituted court. He ought to have all the benefit that might have resulted from a decision of the case by the proper forum." *Miller* v. *Insurance Co.*, 8 W. Va. 515; *Schwartzbach* v. *Protective Union*, 25 W. Va. 622; *Franklin* v. *Geho*, 30 W. Va. 27, (3 S. E. 168). If the court erred in permitting plaintiff to demur, it is error of which plaintiff cannot complain. Plaintiff fails to show in his evidence that he had complied with the terms of the contract upon which he brings this action, fails to show that he had succeeded in releasing both of the tracts of land from the lien mentioned in the contract, or that he had succeeded in relieving either of said tracts from liability, which was a condition precedent to entitle him to recover upon the contract. The land may yet be in peril by reason of said judgment. The sixth assignment of error is well taken.

It follows that the judgment and the verdict of the jury should have been set aside, and the plaintiff's action dismissed.

Reversed.

CHARLESTON.

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STATE *ex rel.* STAFFORD *v.* HAWK, WARDEN.

Submitted January 27, 1900 —Decided January 27, 1900.

1. GOVERNOR—*Reprieve—Discretion.*

   The power to reprieve in all cases of felony is vested in the governor of this State, by the constitution thereof, where the necessity therefor exists. He is the sole judge of such necessity, and his conclusions are not reviewable by the courts, but are binding on the other departments of the government. (p. 435).

2. CONVICT—*Execution—Time.*

   A person convicted of a felony in a circuit court is entitled to have the execution of judgment suspended until a reasonable time after the next regular term of the Supreme Court of Appeals, that he may make application thereto for a writ of error. (p 435).

Mandamus by the State, on the relation of J. L. Stafford, against S. A. Hawk, warden of the penitentiary.

Denied.

VINSON & THOMPSON and JOHN MARCUM, for relator.

EDGAR P. RUCKER, ATTY. GEN. and E. W. WILSON, for respondent.

DENT, JUDGE:

To a writ of *mandamus nisi* requiring the warden of the penitentiary to receive and confine therein Elias Hatfield, Jr., convicted in the circuit court of Mingo County for murder, and sentenced to imprisonment for twelve years, the return is made that the governor had granted a reprieve for thirty days to permit the prisoner to apply to this Court for a writ of error. To this return the relator demurs as insufficient, on the sole ground that the governor has no power to reprieve except in capital offenses. Section 10, Article VII., of the Constitution provides: "The governor shall have power to remit fines and penalties in such cases

and under such regulations as may be prescribed by law; to commute capital punishment, and, except where the prosecution has been carried on by the house of delegates, to grant reprieves and pardons after conviction." The power to pardon necessarily includes the power to reprieve or suspend the sentence until the matter can be inquired into and determined. At common law the power to reprieve was lodged in the courts, as the representatives of the king, he being considered the very fountain of justice; and he was never called upon to exercise it except in capital cases of necessity. All offenses were deemed offenses against the king. "It is reasonable that he only who is injured should have the power of forgiving." 1 Cooley, Bl. (3d Ed.) 268. Because the king was never personally called upon to exercise the power of reprieve, owing to the authority delegated by him to his courts, except in capital cases, has grown up the theory that he had no such power. Almost all offenses in England in its early history were capital, the number being not less than one hundred and sixty. The king was kept so busy in capital cases that minor offenses or misdemeanors were intrusted to his courts, justices, and magistrates. That he had the power to reprieve or suspend sentence in any case of necessity, there cannot be the least doubt. The governor of this State is clothed with the king's prerogative in this respect, except wherein it is plainly limited by the Constitution. Hence he has the power to reprieve in all cases of felony where necessity requires his intervention. Of this necessity he is the sole and final judge, and his conclusions are not reviewable by the courts. In such cases as the present, while the power exists, the necessity of its exercise should be avoided by the trial court, as provided by law, postponing "the execution of its sentence until a reasonable time beyond the first day of the next term of the Supreme Court of Appeals." Section 2, chapter 160, Code. This necessarily means a regular term fixed by statute. The time granted should be sufficient for the proper preparation of the record and presentation of his petition to the Supreme Court. The time in this case, without regard to the terms of the Supreme Court, was fixed at sixty days, —ordinarily a sufficient time; but, owing to some unusual

delay on the part of the stenographer, which remains without reasonable explanation, the time, by no fault of the prisoner, proved insufficient. The prisoner was therefore justly entitled to an extension of the time. The trial court might have granted it, thus correcting its error, not judicial in its character, on motion of the prisoner, and of which no one could have complained. Even if it were judicial error, the prisoner would be bound by it, as committed at his instance, for his benefit. *Fults* v. *State*, 2 Sneed, 232. If the circuit court refused to make the correction on proper application, this Court would have either compelled it to do so, or corrected its error. This would have taken way the necessity for executive interference, provided it could have been accomplished without delay. Doubts of power, procrastination of various kinds, and even unavoidable delays, in a case of this character, rendered the interference of the executive a necessity, as being more effective and prompt than an application to the courts. This, however, should be a warning to the circuit court to grant to persons convicted of felony the reasonable time provided by statute, and compel its officers to discharge their duties so as to facilitate, instead of delaying, their applications for writs of error to this Court. Neither a court nor any of its officers should be permitted to indirectly deprive a prisoner of his statutory rights. If innocent, he should not be subjected to punishment unjustly; and, if guilty, his punishment should be in accordance with law.

Denied.

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s64 611
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CHARLESTON.

STATE v. KING *et al.*

Submitted November 24, 1899—Decided February 7, 1900.

1. FORFEITURE—*Taxes—Payment—Redemption.*

Where a suit is brought in the name of the State for the purpose of subjecting a tract of land to sale for the benefit of the school fund, the former owner of any such tract at the time of the forfeiture shall, if known, be made a defendant; and at any time during the pendency of the suit, and before a decree for the confirmation thereof has been entered by the court, and upon full and satisfactory proof that at the time the title to said land vested in the State he had a good and valid title thereto, the court may, by a proper decree, permit such former owner, upon the payment into court or to the commissioner of school lands of the costs, taxes, and interest properly chargeable thereon, to be fixed by the court in its decree, to redeem the real estate mentioned in his petition; but the taxes and interest properly chargeable thereon must be ascertained by proof, and not by mere conjecture. (pp. 441-442).

2. COMMISSIONER'S REPORT—*Exceptions—Error.*

If a comissioner's report is not excepted to, it is taken to be correct as to adult parties, and will not be examined by either the lower or appellate court, and no advantage of any error therein can be taken unless it be error apparent on the face of the report; but such an error can be taken advantage of in either court at the hearing without exceptions. (pp. 445-446).

3. DECREE—*Error—Parties.*

In a proceeding of this character to sell three hundred and twenty-seven thousand acres, part of a five hundred thousand-acre tract lying partly in the state of Virginia, it is error to allow the former owner, upon the payment of the taxes and interest found to be due on ten thousand acres by a commissioner, to redeem the entire three hundred and twenty-seven thousand acres, providing that such redemption shall not affect the rights that any person not a party to the suit might have under the provisions of section 3 of Article XIII of the Constitution of the State. (p. 447).

4. FORFEITURE—*Redemption—Taxes—Payment.*

In order to redeem the undivided portion of a large tract

of land from forfeiture to the state for nonentry and nonpayment of taxes, such portion should be carefully described and accurately located by the person seeking redemption, that the court may properly ascertain and fix in its decree the costs, state, county, and district taxes, and interest thereon, chargeable against the same, the prepayment of which is necessary to consummate such redemption. (p, 451).

Appeal from Circuit Court, Wyoming County.

Suit by the State against Henry C. King and others for the sale of land forfeited for nonpayment of taxes. From a decree allowing defendants to redeem the land, the State appeals.

Reversed.

E. P. RUCKER, ATTY. GEN., CAMPBELL, HOLT & CAMPBELL, BROWN, JACKSON & KNIGHT, and VINSON & THOMPSON for the State.

M. F. STILES, E. L. BUTTRICK, FLOURNOY, PRICE & SMITH, and MOLLOHAN & MCCLINTIC, for appellees.

ENGLISH, JUDGE:

This was a suit in equity, instituted in the circuit court of Wyoming County on the 7th of May, 1894, by the State of West Virginia, against Henry C. King and others, having for its object the sale of five hundred thousand acres of land for the benefit of the school fund, which tract was claimed by said King and others, and was situated partly in Wyoming and partly in Logan and Mingo Counties. This land was patented to Robert Morris, assignee of Wilson Cary Nicholas, on June 23, 1705, or so much as lies within this State. This suit, and the proceedings therein, are claimed to be in pursuance of the requirements and provisions of chapter 105 of the Code, and the act amending it passed February 23, 1893. An original and three amended bills were filed in attempting to make the proper allegations and the proper parties. On June 25, 1896, said King filed a petition and answer, claiming to be the owner of the land, denying that any portion had become forfeited for nonentry or nonpayment of taxes, and praying that, in the event it should be held to be forfeited, he might be permitted to redeem the same. Alexander McClintock, not a party to the suit, at the same time filed a petition objecting.

to King's prayer to redeem, objecting to the jurisdiction of the court, and asserting a claim to a tract which interlocked with said five hundred thousand acre tract, but no action was taken with reference thereto which is claimed as error in this cause. An order of publication, stating the object of the suit, was published as to certain absent defendants, and on September 27, 1894, the cause was referred to a commissioner, with instructions to inquire into and report upon the matters and things set forth in plaintiff's bill, and especially the amount of taxes and interest due and unpaid on that part of the land lying in the State of West Virginia; in whom the legal title was at the time of the forfeiture, if the fact can be ascertained; in whose name, and for what cause, the land was forfeited, and the facts in relation thereto; what portion, if any, is claimed by any person under the provisions of section 3 of Article XIII. of the Constitution of the State; the facts in relation to every such claim, and boundaries thereof; also to report whether or not any of said land has been sold by the State in any proceeding for the sale of school lands, and whether the taxes have been regularly paid since such sale; also to ascertain the proximate quantity within the county of Wyoming; and he was required to give the notice required by section 8 of chapter 24 of the Acts of 1893, by publishing the same in the weekly newspaper of that county. Said section also requires that such notice shall be posted at the front door of the court house, at least four weeks before proceeding to discharge the duties under such decree, of the time and place at which he will so proceed; and such notice so published and posted shall be equivalent to personal service on all parties to the record in such suit, and on all unknown owners and claimants of any tract or parcel of land mentioned in the bill, or any part thereof.

The commissioner, in his report, says that, after giving the notice required by said decree (which only required him to publish the notice in a newspaper), he proceeded to investigate the matter and things required by said decree, and reports, among other things, that three thousand acres of said survey lie in Wyoming County, West Virginia, besides the junior patents, which are protected under section 3 of Article XIII. of the Constitution of this State: that

said five hundred thousand acre survey was redeemed in the circuit court of Wyoming County, and the taxes paid by Robert E. Randall, trustee of the estate of James Swann, but the trustee failed to cause said land to be entered on the assessors' books for 1884, or for any year from 1884 to the date of the said report; that in June, 1886, John R. Reed was appointed, by the United States circuit court for the district of West Virginia, trustee of said Swann estate to succeed said Randall, trustee, and the legal title to said land was in said Reed, trustee, at the date of its forfeiture; that the same is forfeited for the owner failing to cause it to be entered on the assessors' land books of Wyoming County for taxation; that said land has not been assessed for the years from 1884 to 1894, inclusive; and that the same is liable to sale for the benefit of the school fund.

The defendant H. C. King filed his answer to said bill which was also treated as a petition, in which he claimed that he had a complete and perfect title to said five hundred thousand acre tract superior to all other claimants, and alleged that, if it should be adjudged forfeited to the State of West Virginia by reason of the non-assessment thereof on the assessors' land books of the several counties wherein the same may lie, then a proper order should be made in the cause allowing him to redeem said land from said forfeiture by the payment into court or to the commissioner of school lands of Wyoming County all the interest, taxes, and damages due thereon. On the 30th of September, 1897, a decree was entered in said cause, holding that said King had the right, superior to all other claimants, to redeem the land by paying the taxes chargeable thereon, with interest and costs of said suit; the cause having been heard in open court upon the report of Commissioner D. A. Robertson, to whom the same was theretofore referred, and upon all the pleadings, evidence, depositions, and papers therein. And said decree recited that, said King having paid to J. R. Robertson, commissioner of school lands of Wyoming County, as admitted by said Robertson in open court, the sum of two thousand one hundred and ninety-eight dollars and sixty-five cents and interest due on the portion of Morris five hundred thousand acre grant in West Virginia, and eight hundred and seventy-one

dollars and forty-three cents, costs of this suit, and also twenty dollars attorney's fee, which total sum of three thousand and ninety dollars and eight cents was fixed by the court as the amount of costs, taxes, and interest chargeable upon said land up to and including the year 1897, said King had the right superior to all others to redeem said land and decreed and declared that portion of said five hundred thousand acre tract which lies in the State of West Virginia, described in said decree, fully redeemed, and all forfeitures of said land taxes and interest heretofore charged or chargeable thereon released and discharged, but provided that said redemption should not affect the rights of any one not a party to the suit under the provisions of section 3, Article XIII. of the Constitution of West Virginia, and from this decree the State obtained this appeal.

Now, in examining the questions raised in this case we are met at the threshold by the question suggested by counsel for the appellees as to the right of the State to an appeal. It is contended that the decree appealed from was, in essence and effect, a consent decree on the part of the State, and its provisions were afterwards accepted; that the State brought the suit, and obtained the relief it sought; that an acceptance of the provisions of the decree without objection was a waiver of any right of appeal. This was a proceeding under chapter 24 of the Acts of 1893, as amendatory of chapter 105 of the Code, for the sale of the land mentioned as forfeited for nonentry on the assessors' books of several counties named in the bill; and, so far as the proceeding applies or has reference to the requirements of the statute which must be complied with before a sale of such land can be made, it is incumbent on the State to proceed regularly in accordance with the statute, but when the former owner, under section 17 of chapter 24 of the Acts of 1893, files his petition for the purpose of redeeming the land, the duty devolves upon him to show himself not only entitled to redeem by reason of his ownership at the time of the forfeiture, but he must pay into court or to the commissioner of school lands the costs, taxes, and interest properly chargeable thereon, to be fixed by the court in its decree. From the language of this statute it is apparent that, in order that the owner

may properly redeem the land sought to be sold, he must pay costs, taxes, and interest as fixed by the court in its decree. We cannot say that the court has the right arbitrarily to fix the amount without proper investigation. Neither will it do to approximate the amount of taxes and interest properly chargeable by guesswork; nor will the payment of a lump sum into the hands of the commissioner of school lands or into court constitute a redemption of the land, unless it be the interest properly chargeable thereon; and it was error in the court to declare the land redeemed without properly fixing and ascertaining the amount of money to be paid. If this was error, it was one of which the State could complain, and could not be considered a consent decree, because it was the action of the court, and nothing on the face of the decree shows that the State assented thereto. It is true that it does not appear that the state's counsel made any objection to the action of the court in allowing said King to redeem; yet, if the record discloses error to the prejudice of the State, it has the right to appeal. Section 22 of chapter 24 of the Acts of 1983 allows appeals from the decrees, orders, and judgments of the circuit court rendered under the provisions of said chapter to be taken as provided in chapter 135 of the Code. Now, it is shown by an exhibit filed with the deposition of W. D. Sell that of this land designated as five hundred thousand acres about twenty-four thousand were located in McDowell county, seventeen thousand in Wyoming County, eighty-six thousand in Mingo County, and two hundred thousand in Logan County. On September 27, 1894, as stated before, the cause was referred to commissioner J. R. Robertson, who was particularly instructed to ascertain the amount of the taxes and interest due and unpaid upon that part of the land in the bill mentioned which lies in the State of West Virginia, in whom the legal title was at the time of forfeiture, etc. Section 8 of chapter 24 provides that, when a decree of reference is made in any such suit, the commissioner, before proceeding to the discharge of his duties, shall give notice to all the parties to such suit, and to all unknown owners and claimants of the lands, or any part of them, mentioned in the bill, by publication in some newspaper printed in the

county in which the suit is brought, and prescribes the form of the notice, which is required to be published once in each week for four successive weeks, and also posted at the front door of the court house of said county at least four weeks before proceding to discharge his duties under the decree, of the time and place at which he will so proceed, and that such notice, when so published and posted, shall be equivalent to the personal service thereof on all the parties to the record in such suit, and on all unknown owners and claimants of any tract or parcel of land mentioned in the bill, or any part thereof. The importance of properly publishing and posting this notice is at once apparent, because, when properly executed, it is made equivalent to personal service, not only on all the parties to the record, but on all unknown owners and claimants of any tract mentioned in the bill; and yet this commissioner proceeded to execute the requirements of the decree of reference in this case, so far as appears from the record, without having posted his notice at the front door of the court house, as required by statute, which duty and prerequisite must be regarded of equal, if not greater, importance than the publication in a newspaper in a case of this character, where many parties in the county seem to have been interested.

On June 25, 1896, another decree of reference was made to said J. R. Robertson, commissioner, and, he having resigned March 27, 1897, the cause was referred to D. A. Robertson, with direction to carry out the requirements of the decree referring the cause to said J. R. Robertson, and he, after publishing notice for four consecutive weeks in the Wyoming Herald, but without such notice at the front door of the court house of said county as required by statute, proceeded to take, state, and report an account in pursuance of the requirements of said decree of reference, and, among other things, reported that about ten thousand acres of said land was unclaimed by junior claimants, and situated in West Virginia,—in McDowell eight hundred acres, in Mingo one thousand, seven hundred acres, in Logan five thousand, seven hundred, and in Wyoming one thousand, eight hundred; that there are a great number of small patents and portions of said five hundred thousand-

acre survey that are claimed under section 3 of Article XIII of the Constitution of this State, but that it would require a number of years, and from ten thousand dollars to twenty thousand dollars to pay the expenses of getting the boundary lines of each one of said junior claimants' land, and showing the title of same; and that there was no money at his disposal, and it was impractible, if not impossible, for him to execute that portion of said decree of reference. He then proceeds to trace the title of said land from the commonwealth to Henry C. King; then ascertains the taxes and interest on the whole of the land not claimed by junior claimants from 1884 to 1897, inclusive, to be two thousand, one hundred and ninety-eight dollars and sixty-five cents. On the 30th of September, 1897, the cause was heard upon this report of D. A. Robertson, which was made the basis of the decree holding that the said H. C. King had the right superior to all others to redeem said land, and reciting the fact that said King had that day paid to the commissioner of school lands the sum of three thousand and ninety dollars and eight cents, declared said land redeemed, and fixed the boundaries of the portion of the tract in West Virginia in accordance with the survey made by W. D. Sell in 1895. The report of J. R. Robertson, before mentioned, was not acted upon in entering the decree complained of, but the record discloses the fact that the notice given by him before proceeding to take the required account was given in the same manner, and no notice was posted at the front door of the court house, and what has been said with reference to the notice given by J. R. Robertson before taking the first account applies to the action of D. A. Robertson with equal force. The language of section 8 is positive: "Such notice when so published and posted shall be equivalent to personal service, not only on all the parties to the record in such suit and all unknown owners and claimants of any tract or parcel of land mentioned in the bill or any part thereof." This is a statutory proceeding, and the statute must be strictly pursued in its requirements before land forfeited to the State can either be sold or redeemed. A commissioner's report appears to be necessary under chapter 24 of the Acts of 1893. Section 8 provides for the reference

and form of the notice, which, when properly given, shall be equivalent to personal service, not only on the parties to the record, but on all unknown owners and claimants. Section 9 provides for the commissioner's report, and section 10 for the hearing on the report. The first commissioner to whom this cause was referred took several depositions, and made an ineffectual attempt to comply with the requirments of the decree, ascertaining that about three thousand acres of the five hundred thousand acre survey was in Wyoming county, and ascertained the taxes and interest on said three thousand acres from 1884 to 1894, inclusive, at one thousand and fifteen dollars and two cents, and undertook to give the boundaries of certain lands which were included in said survey, the titles to which were protected under the Constitution of the State; and concluded by stating that he was unable to complete his report as to that portion of said five hundred thousand acres lying in Logan and McDowell Counties.

Now. while it is true that this report was ignored and not acted upon in the decree, it serves to show the uncertainties to the amount of land in Wyoming County declared redeemed by this decree. This commissioner having resigned, his successor, D. A. Robertson, reported that about ten thousand acres of said land is unclaimed by junior claimants, one thousand, eight hundred acres of which is located in Wyoming County, and the residue in McDowell, Mingo, and Logan; that a great number of small patents and portions of said five hundred thousand acres is claimed under section 3, Article XIII, of the Constitution, but that it would require years, and from ten thousand dollars to twenty thousand dollars, to pay for obtaining the boundary line of each of said junior claimants' land. He further reports that under the circumstances he has been obliged to determine the quantity of land not claimed under title adverse to said Robert Morris' title from such data and information as he could obtain to reach a practical basis for computing the taxes on said unclaimed lands, and has considered the situation and condition of said land, finding it to be situated largely along the mountains and ridges, etc. On consideration of these facts the commissioner found the total amount of taxes

and interest chargeable to said land from 1884 to 1897 to be two thousand, one hundred and ninety-eight dollars and sixty-five cents, and upon the payment of this amount due upon ten thousand acres, with costs, fees, etc., said King was allowed to redeem said land so far as the same lies in the State of West Virginia, and so far as title thereto is in this State, and proceeds to fix the exterior boundaries thereto according to a resurvey made in 1895 by W. D. Sell. Now, let us see upon what "data and information" Commissioner D. A. Robertson bases his conclusion as to the number of acres and location of the land on which the appellant was entitled to receive taxes and interest in redemption of same. It is true that the commissioner took depositions, but was the testimony elicited such as a commissioner should base his report upon in a case of this character under the requirements of the decree? The witness, Sell, was first examined by him, and when asked to approximate, as near as he could, the number of acres of the land within the exterior lines of said five hundred thousand acre tract not claimed by the junior claimants, and how much of same is situated in the counties of McDowell, Mingo, Logan, and Wyoming, replied: "From my knowledge of the survey and of the country and claimants therein, I estimate that there are in round numbers, ten thousand acres in the four counties above named. That in McDowell is eight per cent., in Mingo seventeen per cent., in Logan fifty-five per cent., and Wyoming eighteen per cent." But this same witness, when asked how long it would take, and what it would cost, to ascertain the number of tracts and the boundaries thereof within said survey claimed under section 3 of Article XIII. of the Constitution, replied that the question was hard to answer, and that it could not be done in less than seven years, at a cost of twenty thousand dollars. Levi Blankenship was also examined, and estimates that there were three thousand acres, or more, in the bounds of Wyoming County, after deducting all junior patents; and again we find the witness Sarver says he has made a careful estimate of the amount of said land, and finds that there is between eleven thousand and twelve thousand acres in Wyoming County, and that from two thousand to three thousand acres thereof are covered by

junior patents. Now, how could the commissioner reconcile this testimony and reach the conclusion he did? Sell fixes the number of acres in the four counties at ten thousand, Blankenship fixes the number in Wyoming at three thousand after deducting junior patents, and Sarver estimates such land in Wyoming at eleven thousand to twelve thousand acres, less two thousand or three thousand covered by junior patents. The discordance of this testimony is apparent when attention is called to the fact that the last-named witness estimates that in the county of Wyoming alone there are as many acres of this tract subject to redemption as Sell estimates in the four counties, while witness Blankenship locates one-third of the land so subject in the county of Wyoming.

Was the commissioner, in view of this conflicting testimony, warranted in fixing the amount of land on which taxes were to be paid at ten thousand acres, to entitle the petitioner, King, to redeem? And, if he was so warranted, can we hold that by paying taxes on ten thousand acres (which taxes were ascertained by said commissioner upon some theory known only to himself, and which his report fails utterly to elucidate or explain) the court was authorized to decree and declare that portion of said five hundred thousand acres which now lies in the State of West Virginia, and is shown to contain three hundred and twenty-seven thousand, so far as the title thereto is vested in this State, fully redeemed, and all forfeitures of said land and taxes and interest heretofore charged or chargeable thereon released and discharged, providing that said redemption should not affect the rights that any person not a party to the suit might have, if any, under the provisions of section 3, Article XIII., of the Constitution of West Virginia? I cannot think the statute ever intended that forfeited land should be redeemed in this manner upon mere conjecture. This decree, as I understand it, allows said King to redeem all of said five hundred thousand acre tract included in the bounds of West Virginia by paying the taxes estimated to be due on ten thousand acres, the title to which was vested in the State, excepting such portions as parties were entitled to hold under section 3 of Article XIII. of the Constitution; but the number of acres held by

such parties and entitled to immunity under the constitution was undetermined by this decree. Neither were the names of the parties or number of acres so held by them, respectively, in any manner ascertained by the decree, and we are unable to say what portion of these lands are claimed under said section of the constitution, but they are asserting claims they would be unable to sustain should suit be brought against them by said King. Some of those parties might be able to sustain their claims, and others not, and yet King, by paying the supposed or approximated taxes on ten thousand acres, was allowed to fully redeem all of the Morris survey lying within the bounds of this State, so far as the title thereto is in the State; so that under this decree there is no certainty that the State has received what she was entitled to by way of redemption of these lands. To show that it was never contemplated by the legislature that questions of title, possession, or boundary arising under chapter 24 of the Acts of 1893 should be determined by conjecture, section 18 of that chapter provides: "In every such suit brought under the provisions of this chapter, the court shall have full jurisdiction, power and authority to hear, try and determine all questions of title, possession and boundary which may arise therein; and regardless of the evidence, if any, already taken therein, may in its discretion direct an issue to be made up and tried at its bar as to any question, matter or thing arising therein, which in the opinion of the court is proper to be tried by a jury." Why, the necessity of this provision, if the question arising could be determined by the conflicting opinions of two or three witnesses, and when the opinion of the witness on whose testimony the report is based, and the amount of taxes required for redemption in the decree, was only asked to approximate as near as he could the number of acres there were within the bounds of said five hundred thousand acre survey, and estimated the same in round numbers at ten thousand acres in the four counties of McDowell, Logan, Mingo, and Wyoming, locating it along the tops of ridges in the heads of hollows and creeks. From this description, where would the assessor find it for future assessment and taxation? Surely, it was never intended by the legislature that a party filing his pe-

tition to redeem a portion of a tract, describing such portion as the title thereto is vested in the State, should be allowed to redeem a tract of three hundred and twenty thousand acres by paying the taxes on ten thousand acres thereof without locating said ten thousand acres otherwise than finding it to be situated largely along the mountains and ridges. As stated, it is claimed that the location of the land is not more definitely fixed and its boundaries ascertained by reason of the time that would be required and the expense that would attend a proper ascertainment of the necessary facts on which to properly determine the amount of taxes due the State, the payment of which is a condition precedent to the redemption. This, we say, is no excuse. To constitute a proper redemption, the taxes due the State must be properly ascertained and paid.

It is claimed the State is estopped by reason of the fact that its attorney received the amount fixed by the court. This, however, cannot be so, if the amount required for the redemption of the land was fixed by the court improperly. It is true, the commissioner's report was not excepted to by counsel for the State, but that does not preclude the State from sustaining her objection to the report for errors apparent on the face of it. See *Boggs* v. *Johnson*, 9 W. Va. 434; *Hyman* v. *Smith*, 10 W. Va. 298; *Kester* v. *Lyon*, 40 W. Va. 161, (20 S. E. 933). My conclusion is that the court erred in fixing the amount to be paid by H. C. King in redemption of said land which still remained vested in the State; and erred also in allowing said King, upon the payment of the amount of taxes fixed and ascertained by the commissioner as due upon the ten thousand acres, to redeem the entire three hundred and twenty-seven thousand acre tract. This error is at once apparent when we consider the fact that the decree allowing the redemption of the entire three hundred and twenty-seven thousand acres except as therein excepted would not only allow King to use this decree of redemption, and proceed against any of said junior claimants, who seemingly were protected under section 3 of Article XIII. of the Constitution, but for some reason were not, but would enable him to oust them from their possessions, and even to do so without ever having paid one cent in redemption thereof. This

at once shows the necessity of fixing the boundaries of the land redeemed, as well as the limits of the land protected under the constitution.

It is claimed that the State was estopped from appealing, because the school commissioner received the amount ascertained to be due by way of redemption; but this contention cannot be sustained when we consider that the State was proceeding to sell its own property for the purpose of collecting its taxes, and the statute provides that the former owner may redeem by paying the taxes. So, if he pays a less sum than the taxes to the commissioner of school lands, who has such powers only as are conferred on him by statute, the State is not estopped from showing that the amount paid was erroneous. Again, as is well suggested by counsel for appellant, the court should place the ten thousand acres claimed to be redeemed somewhere, in some locality, and the party redeeming should not be allowed to slide it around this three hundred and twenty-seven thousand acre tract to suit his convenience. For these reasons, the decree complained of is reversed, except so far as it recognizes the right of H. C. King to redeem said land by proper proceedings in accordance with the statute, and the cause is remanded.

ON REHEARING.

(February, 1900.)

After carefully considering the arguments of counsel, I see no cause to change the opinion already handed down, and have only thought proper to modify the fourth point of the syllabus, in order to make it more definite and explicit.

DENT, JUDGE: (*concurring*).

In the case of *Totten* v. *Nighbert*, 41 W. Va. 800, (24 S. E 627), this Court held that "the State is not bound by the unauthorized or illegal acts of its officers, nor can its title to a tract of land be transferred, devested, or affected in any manner or to any extent by such unauthorized or illegal acts, and all persons who deal with such officers do so at their peril in all matters wherein such officers exceed

their legitimate powers." This law rules and controls this case. If the officers who acted for the State in the court below confined themselves to their legitimate powers and strictly pursued the law in relation thereto, the State is thereby estopped, and this appeal is not maintainable. If, on the other hand, such officers disregarded the provisions of the law, and thereby exceeded their legitimate powers, this appeal is maintainable. The land in controversy is the property of the State by forfeiture. As a matter of grace, it extends to the former owner the right to redeem the same on payment of costs, taxes, and interest. If he desires to redeem the land as forfeited, he can do so by payment of costs, taxes, and interest ascertained as against the whole thereof; but, if he desires to redeem a less quantity than the whole, it is his duty to carefully describe and accurately locate the portion he seeks to redeem, so that the court may properly ascertain and fix in its decree the costs, State, county, and district taxes, and interest thereon, chargeable against the same, the prepayment of which is necessary to consummate such redemption. The State officers are not authorized to permit redemption in any other way, and their doing so is in excess and abuse of their powers, and the decree of the circuit court authorizing such redemption is not only erroneous, but is a nullity. For instance, in this case a tract of land containing three hundred and twenty-seven thousand acres, subject to certain unknown exceptions, is permitted to be redeemed on the mere theory or estimate that after such exceptions are deducted only ten thousand acres will remain scattered somewhere within the boundary of four separate counties, and on this basis a pretended estimate of the unpaid taxes is made. Such a redemption as this was not contemplated by the statute, nor would it ever have been authorized by the legislature. It is not as well defined as the long-time abandoned inclusive grant, which did, at least, set forth the number of acres of the prior and included grants reserved. This alleged redemption furnishes nothing on which to base anything like an accurate statement of the unpaid taxes, but the whole is guesswork, pure and simple. The lands are here. They belong to the State. The former owner may redeem them if he will com-

ply with his obligations to the State. But he must point them out, and show the district and county in which they are situated. Then the taxes can be fairly ascertained and the title, so far as it remains in the State, may be transferred to him. He is not bound to redeem any portion thereof unless he wants to, but he must make known the portion that he does want to redeem, so that the State may know and sell or properly assess that which is not redeemed. It is not sufficient to say he redeems the whole except such portions as are held by others by a better title; for the State knows nothing about the title of others. It is simply trying to collect its taxes off of the lands forfeited. If the former owner still wants to claim them under his forfeited title, he may do so by the payment of the taxes justly due thereon, subject to the rights that any person not a party to the redemption suit may have under the provisions of section 3, Article XIII., of the Constitution. Such persons are unknown, and, in so far as they are concerned, the State has the right to claim taxes for the whole boundary. If there are any of such holdings that the former owner does not want to include in and cover by his redemption he has the right to exclude them therefrom, and be relieved from payment of taxes thereon; but, if there are any of such holdings that are inchoate or doubtful, that the former owner wants to cover by his redemption, he has the right to do so by prepayment of the taxes thereon. None of these things can be accomplished otherwise than by the former owner locating the boundary he wishes to redeem, thus excluding therefrom such portion as he abandons. This knowledge is in the possession of the former owner. If he does not have it, no one does. If he wants to eject a subsequent claimant to any portion of this land, he should pay the taxes on such portion. It is certainly asking too much of the State to demand by the payment of the taxes on ten thousand acres an India-rubber title to stretch over three hundred and twenty-seven thousand acres at his pleasure. And, if such a decree were permitted to stand in a suit in ejectment thereunder, the trial court not only should require the former owner to show that the defendant's land was included in the three hundred and twenty-seven thousand acres, but that it was

also included in the ten thousand on which the taxes were paid, and that he did not have such ten thousand acres exclusive of defendant's land. This would be the only just method of reducing such former owner to the true extent of his redemption. *Stockton* v. *Morris*, 39 W. Va. 432, (19 S. E. 531). For, if he already had the ten thousand acres on which he paid the redemption taxes, exclusive of the defendant's land, such land could not be regarded as redeemed, but the title, if not in the defendant, would still be in the State, unredeemed, and the ejectment suit would thereby be defeated. The decree, however, permits the redemption of the whole three hundred and twenty-seven thousand acres of land. It therefore does not follow, nor is it based on, the commissioner's report, except as to the amount of the taxes. The report ascertains "that about ten thousand acres of said land is unclaimed by junior claimants, and situated in West Virginia,—in McDowell County eight hundred acres, Mingo County one thousand seven hundred acres, in Logan County five thousand seven hundred, and in Wyoming County one thousand eight hundred acres; and the taxes and interest thereon will be found in a table hereinafter set forth." This is all the land on which the taxes and interest were ascertained, and this is all that, in any event, should have been adjudged redeemed, for it is all on which the taxes have been paid. This excludes all the land that is claimed by junior claimants, whether their claims are just or unjust; and the decree of redemption should have done the same thing, thus giving to the former owner ten thousand acres not claimed by junior claimants, and giving him no land but that on which he had paid the taxes as ascertained and fixed. While such a redemption would have been a departure from the accuracy required by law, it would not have been plainly unjust to the State. The decree, in disregard of the commissioner's report, is made not only to cover the ten thousand acres, but all the land claimed by junior claimants, except such as are protected by the Constitution. Thus, all the unprotected claimants are placed at the mercy of the former owner, although he paid no taxes in redemption of their lands from forfeiture. While it is law that he may redeem these lands, and eject the claim-

ants, yet the law does not permit him to do so; nor is it just to the State that he should until he satisfies the unpaid taxes due thereon. The inchoate title of these claimants until the payment of the arrearage taxes is superior to the forfeited title, and may become absolute. To permit such an illegal redemption to stand as valid would be to deprive these junior claimants of their possessory rights without due process of law. They have no right to object to the redemption of the land, but they have the right to object to its redemption in an illegal manner; and, the decree being in excess of the jurisdiction of the circuit court as limited by the statute, and void as to the State, would be likewise void as to the junior claimant, and invalid to sustain the forfeited title. If this Court should permit this decree to stand, and hold the State had not the right of appeal, this would not be binding on the junior claimants; and, when this decree was presented against them, they would have the right to show by the record, including the commissioner's report, that the lands claimed by them were excluded from the redemption, that the taxes had not been paid thereon, and that the decree, in so far as it affected them, was in excess of the jurisdiction of the court. Without prepayment of taxes thereon, the court is without authority to relieve the land from forfeiture. This is made a condition precedent to redemption. If the decree fails to require such prepayment directly or indirectly, it is void. The circuit court cannot give away the State lands nor the State's taxes. Such donations are void. The legislature only has limited power to do so. Freem. Judgm. § 120c; *Yates* v. *Taylor County Court*, (decided at this term) 35 S. E. 24. Such decree is, therefore, valueless, in any event, to the original owner, except as to that portion of the land on which he has prepaid the taxes, namely, land not in the possesssion of junior claimants excluded by the estimate of the commissioner's report in ascertaining the unpaid taxes, and, for the good of all parties in interest, should be reversed and annulled.

Reversed.

CHARLESTON.

ARMSTRONG *et al v.* OIL-WELL SUPPLY CO. *et al.*

Submitted January 11, 1900—Decided March 24, 1900.

CONVEYANCE—*Fraud—Notice—Reference.*

The O. W. S. Co., a corporation, brought its suit to enforce its claim of six hundred and seventy-three dollars and fifty-nine cents against its insolvent debtor, M., and to set aside a deed of trust on stock of merchandise made by M. to A., trustee, to indemnify M.'s indorser, B. An injunction was granted, and a receiver appointed. M. proposed to plaintiff that if it would dismiss its suit, and restore the property to his possession, and give him long time on the debt, he would furnish paper, with good indorsers, for amount of its claim. Accordingly the suit was dismissed, the receiver discharged, and possession of the property restored. When this was done, M. sold the stock of goods to A. and B., in consideration of two thousand and seventy-two dollars, which was to be discharged by the payment of the three notes secured in the deed of trust, amounting to one thousand and four hundred dollars, and the amount of the O. W. S. Co. claim, represented by three notes, of two hundred and twenty-four dollars and fifty-three cents each, at one, two and three years, made by M., payable to the order of A. and B., and indorsed by them, and which were delivered to the O. W. S. Co. for its debt. A few days thereafter W., L. & Co. brought their suit against M., A., and B. to set aside said deed of trust and agreement of sale between M. and A. and B.; alleging that said sale and delivery of the three notes to the O. W. S. Co. for its debt gave it an illegal preference, to the exclusion and prejudice of other creditors of M. *Held*, that the O. W. S. Co., having no knowledge or notice of the sale from M. to A. and B., the indorsers, at the time it received the notes, had the right to hold the indorsers for the payment thereof in satisfaction of its debt, and the same was not an illegal preference in its favor, under section 2, chapter 74, Code. (p. 464).

Appeal from Circuit Court, Jackson County.

Bill by J. L. Armstrong and E. W. Brown against the

Oil-Well Supply Company and others. Decree for defendants, and plaintiffs appeal.

Affirmed.

WM. A. PARSONS and R. F. FLEMING, for appellants.

MERRICK & SMITH, for appellees.

MCWHORTER, PRESIDENT:

On the 18th of July, 1891, E. R. McGugin conveyed his stock of hardware, stoves and tinware in his store at Ravenswood, Jackson County, to J. L. Armstrong, trustee, to secure and save harmless E. W. Brown as indorser on three negotiable notes of said McGugin, for five hundred dollars each, and renewals thereof, or of any part of same. On the 18th day of August, 1891, the Oil-Well Supply Company, a corporation, creditor of said McGugin to the amount of six hundred and seventy-three dollars and fifty-nine cents, filed its bill in the circuit court of Jackson County against said McGugin, Armstrong, trustee, and E. W. Brown; attacking said deed of trust as fraudulent,—giving unlawful preferences. An injunction was granted, restraining the trustee from disposing of the goods, and appointing a receiver thereof. On the 20th of August, 1891, a motion was heard in chambers before the judge of said court (plaintiff, Oil-Well Supply Company, being present by its agent, L. P. Hill, and also by counsel); and no objection being made, or reasons offered why said motion should not be allowed, the order appointing the receiver was rescinded, the injunction dissolved, and the bill dismissed, at plaintiffs' costs (docket fee being waived), and McGugin put in possession of his property. On the 22d of August three negotiable notes, at one, two, and three years, respectively, for two hundred and twenty-four dollars and fifty-three cents each, being dated August 20, 1891, aggregating six hundred and seventy-three dollars and fifty-nine cents, the amount of plaintiffs' claim, were made by E. R. McGugin, payable to J. L. Armstrong and E. W. Brown, and by them indorsed, and by McGugin delivered to the Oil-Well Supply Company. On the 1st of September, 1891, C. D. Merrick, of the law firm of Merrick & Smith, went to Jackson court house with a bill in chancery

on behalf of Wolf, Lane & Co., creditors of said McGugin, prepared by said firm, and verified by the oath of Levin Smith, one of the firm, similar to the bill which had been filed by the Oil-Well Supply Company for the purpose of setting aside said deed of trust, enjoining the disposition of the goods by the parties, and appointing a special receiver in the cause. On arriving at the court house he learned for the first time that McGugin had sold the stock of goods to Armstrong and Brown, when he prepared another bill for Wolf, Lane & Co., for the purpose of enjoining McGugin, Brown, and Armstrong from selling, disposing of, or controlling the said goods, for setting aside preferences, and for the appointment of a special receiver, and applying the proceeds of the goods to the debts of McGugin, *pro rata*. The injunction was granted, and the receiver appointed. The cause was heard on December 24, 1891, on motion to dissolve the injunction and discharge the receiver, which motion prevailed, and Wolf, Lane & Co. appealed to this Court from the decree. The decree of the circuit court was affirmed, the bill not being dismissed, and the cause was remanded for further proceedings for the purpose of ascertaining "all debts of McGugin and applying the sum which Armstrong and Brown agreed to pay *pro rata* among them. They seem to have paid two of the notes, but they must be held for the whole sum for ratable distribution, charging the creditor who received the same to reimburse them, beyond their proper share, if they have been paid beyond it." The notes here referred to as two of them being paid are the three notes of McGugin, for two hundred and twenty-four dollars and fifty-three cents each, indorsed by Armstrong and Brown to the Oil-Well Supply Company. The opinion further says: "I do not see why the creditors holding the notes specified in said deed, including the Oil-Well Supply Company, were not made parties. The bill attacks their rights, and Armstrong and Brown were entitled to have them made parties. They must be yet made parties." This cause appears in 37 W. Va. 552, (16 S. E. 797). The plaintiffs, Wolf, Lane & Co., filed an amended bill, making the Oil-Well Supply Company and First National Bank of Parkersburg additional parties; and the cause was re-

ferred to Commissioner George J. Walker to ascertain and report who were the creditors of said McGugin at the time of the sale of his stock of merchandise to Armstrong and Brown, the respective amounts due to said creditors, the assets of said McGugin at said time, the sum which Armstrong and Brown agreed to pay for said stock of merchandise, and the *pro rata* sum which each of said creditors was and is entitled to receive out of the said assets, and out of the amount which said Armstrong and Brown agreed to pay for said merchandise, and any other pertinent matter, etc. Said commissioner reported, and the cause was recommitted to him to report fully the same matters required by the former order of reference, and further to state an account between the defendants Armstrong and Brown and the Oil-Well Supply Company, and other creditors of McGugin named in the deed of sale of the stock of goods of August 20, 1891, by McGugin to Armstrong and Brown, showing the amounts paid by said Armstrong and Brown, and by each of them, to the respective creditors, when the same was so paid, and what sum of money, if any, each of said respective creditors had received from said Armstrong and Brown in excess of the *pro rata* share of each of said creditors in the price of said stock of goods; also any pertinent matter or account that might be required to be specially stated and reported by any person in interest; and on the 9th day of August, 1894, the cause was heard, among other things, upon the report of Commissioner Walker, "which report was filed in the papers of this cause on the 25th day of July, 1894, and to which report there are no exceptions, and from which report it appears that the assets of the said E. R. McGugin on the 20th day of August, 1891 (the date of the said sale thereof to the said J. L. Armstrong and E. W. Brown), amounted to two thousand and seventy-two dollars, and that the same with interest thereon to the 1st day of August, 1894, amounted to two thousand four hundred and forty-four dollars; and it further appearing to the court from said report that the following claims and demands in favor of the various parties hereinafter named against the said E. R. McGugin, and due and payable by him at the time of said sale, have been filed, proved before, and allowed by said

commissioner, as follows: * * * J. L. Armstrong and E. W. Brown, two hundred and seventy-one dollars and seventy-eight cents; same and same, two hundred and seventy-one dollars and seventy-eight cents; same and same, two hundred and seventy-one dollars and seventy-eight cents; * * * the said several and respective sums being the aggregates of said claims on the 1st day of August, 1894, including interest to that date." To which report there were no exceptions, and the same was approved and confirmed, and Warren Miller, Esq., was appointed a special commissioner for the purpose of collecting and disbursing said funds to and among the several persons who had shown themselves entitled thereto according to their respective interests, as shown by said report of Commissioner Walker. It does not appear from said report of Commissioner Walker that defendant Oil-Well Supply Company presented or proved any claim before said commissioner, but the three notes held by it, and indorsed by Armstrong and Brown, were proved by and allowed to Armstrong and Brown, who also collected the *pro rata* share thereon from Special Commissioner Miller, or retained the same and receipted to Miller for it; said Armstrong and Brown having paid to the Oil-Well Supply Company the first and second of said notes. In 1895 said company brought its action of debt in said circuit court upon the note at three years against E. R. McGugin, J. L. Armstrong, and E. W. Brown. After appearance by the defendants, and the pleadings were made up in said action, Armstrong and Brown filed their bill in equity, alleging that the three notes represented a part of the consideration moving from them to McGugin for the purchase of the stock of goods, and there was no other consideration for same; that, McGugin being insolvent at the time, it made an illegal preference in favor of the Oil-Well Supply Company, as a creditor of said McGugin; that such preference was void, and the proceeds of the notes should be applied *pro rata* to all the debts of McGugin,—and praying that the Oil-Well Supply Company be restrained from further prosecuting said action of debt against them, and that the collection of the note sued on be perpetually enjoined as to plaintiffs, and that they have a decree of restitution and re-

covery against the defendant Oil-Well Supply Company for the full amount of excess paid by them to said Oil-Well Supply Company, and to the order of it, upon the said two notes, of two hundred and forty-four dollars and fifty-three cents each, at one and two years, over and above its *pro rata* share, which injunction was granted. The defendant Oil-Well Supply Company filed its demurrer, and answer setting up the circumstances under which it came in possession of said notes in consideration of the dissolving of its injunction and discharge of the receiver, the dismissal of its bill, and restoration of the property to McGugin. By stipulation of December 9, 1896, the original papers and record entries in the chancery suit of Wolf, Lane & Co. against McGugin and others, and in the action at law of the Oil-Well Supply Company against McGugin, Armstrong & Brown, which action was enjoined in this suit, and the three-years note of August 20, 1891, for two hundred and twenty-four dollars and fifty-three cents, and certificate of protest, should be considered in evidence in this cause; and by stipulation of February 25, 1897, certain affidavits and depositions therein enumerated were to be read and used in evidence upon the hearing of this cause, as if they were depositions regularly taken on notice. On the 26th day of November, 1897, the cause was heard upon all the papers and orders filed and made in the cause, and as provided in said stipulations, and upon motion to dissolve the injunction granted in the cause, of which motion due notice had been given, at which hearing the court sustained the motion, and dissolved the injunction. On March 13, 1898, plaintiffs tendered their amended and supplemental bill, which was filed, and moved the court to reinstate the injunction so dissolved, of which the court took time to consider. On the 4th day of March, 1898, defendant tendered its demurrer to the said amended bill, and, without waiving its demurrer, filed its answer. Plaintiffs joined in the demurrer, and replied generally to the answer.

The amended and supplemental bill alleged that said Oil-Well Supply Company at the time of the sale of the stock of goods by McGugin to plaintiffs, and at the time it received said three notes for its debt against said McGugin, had full knowledge and notice of said sale by McGugin to

them, and of the consideration for said notes, and that it took and received said notes with such full knowledge and notice of the unlawful preference thereby given to said company over other creditors, and that said company did thereby attempt to secure a preference and priority over the other creditors of McGugin in payment of the debt, knowing that the effect of said agreement and notes was to give it a preference and priority over the other creditors of said McGugin, and the same was to the prejudice of the other creditors of said McGugin; that the said notes, although upon their face negotiable, were and are void, because they, together with said agreement of sale, constituted a preference; that after the cause of Wolf, Lane & Co. against McGugin had been referred to a commissioner, as directed by the Supreme Court of Appeals in its opinion affirming the decree of the circuit court, such commissioner pursuant to such reference, reported all the debts against said McGugin that were proved before him, existing on said August 20, 1891. Among the debts so reported, plaintiffs were informed, the debt of the Oil-Well Supply Company was reported in their favor, for the reason that plaintiffs had prior thereto paid two of the three notes given therefor, and for the additional reason, as plaintiffs were informed, that the said opinion of the Supreme Court required said debt to be so reported, charging the creditors, if there were such, who received more than their *pro rata* share of said purchase money, with the excess received by such creditors beyond their *pro rata* share, and prayer for the reinstatement and perpetuation of said injunction. The answer refers to its answer to the original bill, and makes it a part of this answer, and denies all or any notice or knowledge of the sale of the stock of goods by McGugin to Armstrong and Brown, or the consideration for said notes, at the time the notes were delivered to it, or that it had knowledge of the sale of said goods for some time after the transaction, but alleges that the notes were made, indorsed, and delivered to it in pursuance of the arrangement with McGugin, and in consideration of the extension of time, the dissolution of the injunction, the discharge of the receiver, dismissal of its suit, and the restoration of the property to the defendants. On the 3d of November,

1898, the cause was again heard, and the court overruled the demurrer to the amended and supplemental bill, and held that the plaintiffs were not entitled to the relief prayed for in their bill and amended and supplemental bill, and that the Oil-Well Supply Company was entitled to recover from plaintiffs the amount of the debt, and interest on the note dated August 20, 1891, payable three years after date, for two hundred and twenty-four dollars and fifty-three cents, made by E. R. McGugin, payable to said J. L. Armstrong and E. W. Brown, and by them indorsed, and that plaintiffs were not entitled to make defense thereof, as set up in their bill in that court, and enjoined plaintiffs from making any further defense in said action of debt under the special pleas filed by them in said action, and from making any defense or claim in said action based upon any of the matters set up or pleaded in plaintiffs' bill in this suit, and judgment for costs of the chancery suit, from which decree, as well as that of November 26, 1897, dissolving the injunction, plaintiffs appealed to this Court.

It is contended by appellants that the agreement of sale by McGugin to Armstrong and Brown, and the making of the notes by McGugin, and the indorsement thereof by Armstrong and Brown, covering the amount due the Oil-Well Supply Company, constituted together a fraudulent preference in favor of said company, which should be set aside. The Oil-Well Supply Company had commenced proceedings to enforce its claim against the estate of its debtor, who made a proposition to give it good indorsers, provided the creditor would give long time and release his property, which it agreed to do, and which was accordingly done, and the paper delivered shortly afterwards, with the indorsements proposed. There is evidence tending to show that the Oil-Well Supply Company may have known of the sale from McGugin to Armstrong and Brown, and that the notes were given as part of the consideration for the price of the goods, but the evidence of the only persons representing the company, and through whom only it could have known the fact, is distinct and positive that it and they knew nothing of it, and thought that McGugin was only carrying out his arrangement in good faith, by turning over to it the indorsed notes, which he had agreed to do in

consideration of the extension of time, the dismissal of the suit, and the release of the property to him. Mr. Armstrong, in his testimony, says he knew prior to the purchase by him and Mr. Brown that the property was in the hands of a receiver, and he did not suppose that Mr. Brown (?) could make sale until he would have his goods released (witness evidently meant McGugin, not Brown), and stated that McGugin told him prior to the time of purchase that the company had proposed to him (McGugin) that if he would give new paper, with good indorsers, they would give him good time on it. This was a valuable consideration, in which not only McGugin was interested, but both Armstrong and Brown. They desired the property released from the litigation which tied it up. The deed of trust secured the notes on which Brown was indorser, and Armstrong was the trustee in said trust. Brown was directly interested in having the suit dismissed, and the possession of the property restored. The indorsers both knew that the notes were to be used by McGugin in settling the claim of the Oil-Well Supply Company. It is said in *Williamson* v. *Cline*, 40 W. Va. at page 204, (20 S. E. 921): "If a pressing creditor agrees to forbear suit for even a day, it may enable the debtor to dispose of property, or get the help of a friend, or in some way save himself from ruin. And although the consideration be small, or even nominal, if it be appreciably valuable, it will be sufficient, and the court will not enter into the work of nicely weighing how small or valuable it may in fact have been. Parties have weighed these things themselves,' —and authorities there cited. "If a person has a right at law, his forbearance to institute legal proceedings to enforce or protect it, is a valuable consideration. Forbearance to go into bankruptcy, to take an appeal, to foreclose a mortgage, to file or enforce a lien, the abandonment of an attachment, the discontinuance of an ejectment, and the granting of a stay of execution are all valuable considerations." 6 Am. & Eng. Enc. Law (2d Ed.) 747, 748, and cases cited. The Oil-Well Supply Company knew nothing of the purchase by Armstrong and Brown. I only had the promise of McGugin to furnish it paper indorsed by them, which he did. In *Smith* v. *Moberly*, 10 B. Mon. 266,

52 Am. Dec. 543, it is held, "Secret agreement between surety and principal cannot affect innocent parties into whose hands the note falls." I think the case of *Merchant & Co.* v. *Whitescarver*, 34 S. E. 813, decided by this Court on December 9, 1899, is directly in point, where it is held (syl., point 1): "A mercantile firm, although indebted to insolvency, may sell its stock of merchandise to a disinterested party, and receive his notes in payment therefor, payable to its order, and assign one or more of said notes in payment of a debt owed by it to a *bona fide* creditor; and such transfer will not be void under section 2, chapter 74, Code, as amended by chapter 4, Acts 1895." The act of 1895 does not materially change the last clause of said section as it stands in the Code. And in *Carr* v. *Summerfield*, 34 S. E. 804, decided by this Court November 28, 1899 (syl., point 4): "An assignment of an account, or an order to one who owes the account to pay the amount due thereon, or any specific part of it, to the payee in the order, is such a transfer of an evidence of debt as will be protected by the last provision of section 2, chapter 74, Code." If the insolvent could take the notes of the purchaser of his stock, and transfer them in payment of a debt owed by him to a *bona fide* creditor, surely he could apply his own notes, with good indorsers, delivered to him by the indorsers to be used in the same way. These notes were taken by the Oil-Well Supply Company, before maturity, for a *bona fide* debt owed to it by McGugin, on which it had commenced proceedings to collect it. In consideration of the dismissal of its suit, and the restoration of his property, and the extension of time, McGugin furnished it the indorsed notes to secure its debt. In *Bank* v. *Johns*, 22 W. Va. 520, it is held that "a *bona fide* holder of negotiable paper, who purchased it for value in the ordinary course of business, before maturity, and without notice of facts which impeach its validity between antecedent parties, has title thereto unaffected by such facts, and may recover on such note, although, as between such antecedent parties, it is without legal validity." By indorsement, the indorser promises that he will discharge the note according to its tenor upon due presentment and notice, that the instrument itself and all prior signatures are genuine, that he

has the right to transfer it, and that it is valid." 2 Am. & Eng. Enc. Law (1st Ed.) 385, and cases cited. When Armstrong and Brown indorsed the notes, they declared the validity thereof, and that they were bound for their payment. Appellants say that in *Wolf* v. *McGugin*, 37 W. Va. 552, (16 S. E. 797), this Court held "that Armstrong and Brown, upon said notes, can only be held for said company's *pro rata* share of said sum of two thousand and seventy-two dollars," and that the Court could not, at the time it so held, have overlooked the fact that these notes were negotiable. The Court, in the opinion, say, "Armstrong and Brown must be held for the whole sum, for ratable distribution among all the creditors; charging the creditor who had received any amount beyond his *pro rata* share to reimburse Brown and Armstrong, if any had been paid beyond it." It must be remembered that the Oil-Well-Supply Company, the holder of the notes, had not up to that time been a party to the suit; and the judge who wrote the opinion, at page 564, 37 W. Va., and page 801, 16 S. E., says: "I do not see why the creditors holding the notes specified in said deed, including the Oil-Well Supply Company, were not made parties. The bill attacks their rights, and Armstrong and Brown were entitled to have them made parties. They must yet be made parties." When the cause was remanded, said company was made a party, and, defending its rights in the case, has shown itself entitled to the notes: leaving for *pro rata* distribution among all the other creditors the said sum of two thousand four hundred and forty-four dollars, as of August 1, 1894, less the sum of said three notes, of two hundred and twenty-four dollars and fifty-three cents each, including interest to said August 1, 1894. The Oil-Well Supply Company could in no wise be affected by any action the court could take in a proceeding to which it was not a party.

In Wolf, Lane & Co.'s bill, in setting forth the consideration of the sale from McGugin to Armstrong and Brown, among other things, it is alleged that the three notes, of two hundred and twenty-four dollars and fifty-three cents each, dated August 20, 1891, payable to the order of J. L. Armstrong and E. W. Brown, in one, two, and three years after date thereof, were indorsed by said Armstrong and

Brown to the Oil-Well Supply Company, and that by said notes and indorsement an illegal preference was given certain creditors, to the exclusion and prejudice of the other creditors, including plaintiffs,—thus making it appear on the face of the bill that the Oil-Well Supply Company was a proper party to the bill; and it also appears from the agreement of sale between McGugin and Armstrong and Brown for the stock of goods that the said three notes were indorsed over to the Oil-Well Supply Company by Armstrong and Brown, and that it was the holder of said notes for the amount of its debt, and the fact is referred to in the answer of Armstrong and Brown to Wolf, Lane & Co.'s bill; and yet the Oil-Well Supply Company is not asked to be made a party to the suit of Wolf, Lane & Co., which, if it had been done, would have prevented the present litigation. If it had been made a party, as it should have been, and the court had ascertained that the Oil-Well Supply Company was entitled to the notes, Armstrong and Brown would have only been required to pay in for *pro rata* distribution among the creditors the residue of the purchase money agreed to be paid by them for the goods, after deducting the amount of the notes.

It is insisted by appellee that Armstrong and Brown are estopped from making the defense they seek to make, because when the Wolf & Lane Co. cause was remanded to the circuit court, and the same was before Commissioner Walker on an order of reference to ascertain the debts against E. R. McGugin, and to ascertain the *pro rata* share of the several creditors, Armstrong and Brown proved before said commissioner all three of the notes indorsed by them to the Oil-Well Supply Company, for their own benefit, and the commissioner reported said three notes in favor of said Armstrong and Brown, which report was approved and confirmed, and the same decreed to them, and in their settlement with Miller, the special commissioner, appointed to collect and distribute the funds *pro rata* among the creditors entitled, they reserved to themselves the *pro rata* share accruing upon all three of said notes according to the decree. In this action they seemed to regard themselves as creditors of McGugin, merely as indorsers having paid and become liable for the

notes. The Oil-Well Supply Company did not prove said notes before the commissioner for a *pro rata* share of the proceeds of the sale of McGugin's stock of goods, but they were proved by the indorsers, and the *pro rata* share collected by them, and thus they acknowledge their liability as indorsers, and the validity of their indorsement and the holder looks to them only as indorsers; and having paid two of said notes to the holder or to its order and being liable as indorsers on the third note, Armstrong and Brown were entitled to prove such debt, and receive the *pro rata* share thereof, as they did. For the reasons herein stated, the decree of the circuit court must be affirmed.

Affirmed.

CHARLESTON.

KAY v. GLADE CREEK & R. R. CO.

Submitted January 23, 1900.—Decided March 24, 1900.

1. STENOGRAPHIC NOTES—*Exceptions Considered.*

Where a stenographic report of evidence is made part of the certificate of evidence upon a motion for a new trial, and it shows objections to questions or evidence, and rulings of the court thereon, and that such rulings were excepted to, and the particular question or evidence complained of is specified distinctly in the motion for a new trial, or in an assignment of error, or in brief of counsel, so that the appellate court can readily and safely find the particular question or evidence to which the exception relates, the appellate court will consider the matter excepted to, though there is no formal bill of exceptions thereto; but such matter will not be considered without such specification, even though such report of evidence notes such objection and exception. (p. 470).

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2. LANDOWNER—*Railroad—Damage.*

In ascertaining damages to a landowner, flowing to the residue of his tract, from the construction of a railroad, danger to buildings, fences, forests, and the like, from fire emanating from locomotives, may be considered as an element of damages, so far as such danger lessens the value of such residue; but such danger must be real, imminent, and reasonably to be apprehended,—not remote or merely possible. The question is, is the residue depreciated in value from that cause, and how much? (pp. 474-475).

3. TRIAL—*Evidence—Material Exception.*

Where there is an exception to the ruling of the trial court, for allowing or refusing to allow a question to be answered by a witness, and it does not appear what the answer was, or what was expected to be proved by him, an appellate court will not consider the exception, as it cannot determine the relevancy, admissibility, or value of the answer or expected answer. If the question alone show that its answer must be material, and it is refused, it is different. If an answer is stricken out, it must appear, else it will not be considered. (p. 478).

4. DAMAGES——*Evidence—Witness—Opinion.*

Opinions of witnesses not personally acquainted with land appropriated for railroad purposes are not admissible as to the value of the land actually taken, or damages to the residue, it not being a question of expert evidence; but a person so acquainted and conversant with the land may state the circumstances and respects in which the land is prejudiced or benefited by the railroad, and may then express his opinion as to the value of the land after completion of the road as compared with what it was before. (p. 479).

Error to circuit Court, Raleigh County.

Action by Elizabeth Kay against the Glade Creek and Raleigh Railroad Company. Judgment for plaintiff, and defendant brings error.

Affirmed.

McGINNIS & McGINNIS and JOHN W. McCREERY, for plaintiff in error.

A. P. FARLEY and J. E. SUMMERFIELD, for defendant in error.

BRANNON, JUDGE:

Elizabeth Kay brought an action of trespass on the case in the circuit court of Raleigh County against the Glade

Creek and Raleigh Railroad Company to recover damages sustained by her from the taking of land of hers and using it for the construction of its railroad, and also for damage done to her by fire claimed to have been started from sparks emitted from a locomotive on said railroad, burning some fencing and injuring timber. A jury found a verdict for one thousand dollars, for which the court rendered judgment, and the company has brought the case to this Court.

A question important in daily practice arises in this case, which seems, under our decisions, to be in a state more or less chaotic and unsettled. The defendant moved the court to set aside the verdict, and, the court having refused to do so, certified all the evidence as taken down by the stenographer; incorporating it in a bill of exceptions, duly noted on the record. Thus, all this evidence is made part of the record by that bill of exceptions. The defendant complains that certain questions propounded by it were ruled out and not allowed to be answered, and that certain questions asked by plaintiff, and objected to by the defendant company, were allowed to be answered. These questions were not made the subject of bills of exception, according to the usual practice, but the stenographic report shows the matter in this wise: When objection to a question was sustained, the report says: "Objection. Sustained. Exception." When objection to a question was not sustained, the report merely says: "Objection. Overruled. Exception." Does this give the excepting parties the benefit of the exception? The questions appear from this report; the objection appears; the exception appears; all the things appear that would appear from a formal bill of exceptions, except only particularity or specification of the particular questions or answers. To get them the Court has to grope though the whole report of the evidence, consisting of hundreds of pages very frequently,—in this case one hundred and sixty-four printed pages, consisting of hundreds of questions and answers; and very often a printed record contains several times that much. Can an appellate court be asked to winnow out from the great mass of questions and answers the particular ones constituting the ground of complaint? In the

case of instructions or other documents admitted or rejected, the task is not difficult, and the danger of mistake small; but in the case of multitudinous questions it is both difficult and dangerous, from the liablity to miss the point. The Virginia Court of Appeals, in *Railroad Co.* v. *Shott*, 92 Va. 34 (22 S. E. 811) says: "A general bill of exceptions, certifying all of the evidence, and noting at intervals that objection was made to questions propounded, and the objection overruled, and exception taken, is not a sufficient exception to the ruling of the court on such questions. In order to have the benefit of an exception to the ruling on a motion to reject or admit evidence, there must be a bill of exceptions, signed by the judge, clearly and distinctly pointing out each erroneous ruling complained of; other wise, the objection will be regarded as abandoned. And while there may be several exceptions saved by the same bill, yet each must set forth clearly and distinctly the ground of objection relied on, so that there may be no confusion amongst them." So, in *Railroad Co.* v. *Ampey*, 93 Va. 108 (25 S. E. 226), where there was a stenographic report, the court held that "objections to the admission or exclusion of evidence, or to giving or refusing instructions, should be brought directly to the attention of the trial court, and, if overruled, a proper bill of exception should be taken, specifically and definitely setting forth the allegation of error, and so much of the evidence as is necessary to render clear the propriety or impropriety of the ruling of the court; otherwise, the exception, though noted at the time, will be treated by the appellate court as waived or abandoned." Under those decisions, we could not consider the points complained of in this case. They state the rule of practice always observed before the advent of stenographic official reports of evidence under statutes such as that found in the Code of 1891 (page 1062). That statute makes such report "official and the best authority in any matter of dispute, and a copy of the same, made as hereinafter provided, shall be used by the parties to the cause in any further proceedings, wherein the use of the same may be required." In *Cummings* v. *Armstrong*, 34 W. Va. 1, (11 S. E. 742), this statute, and the virtue of stenographic reports under it, are discussed by JUDGE

LUCAS quite elaborately and well. His view made that report, *per se*, by force of the statute alone, part of the record. JUDGE SNYDER and myself could not go so far as to hold the report a part of the record, and of absolute verity as such, merely by force of the statute; but we did concede that when that report was made a part of a bill of exceptions by the Judge, and thus signally verified by him as correct, such report of evidence became part of the record, and entitled to credit as such. That has been done in this case. I again ask, can the exceptions to the admission and exclusion of evidence, merely noted in short in the stenographic report, in the manner above indicated, be considered by the Supreme Court, in the absence of a bill of exceptions, under the usual practice, specifically designating the particular evidence complained of as erroneously admitted or excluded? I repeat that the objection, ruling, and exception are part of the record; and where the answer is given, it is part of the record, also. Thus, the only trouble is want of specification, in the great volume of evidence, of the particular questions allowed or refused to be answered. Let us see what light our past decisions may cast upon the questions: In *State* v. *Harr*, 38 W. Va. 58 (17 S. E. 794), we find that section 4 of the syllabus says that: "To make available in the Appellate Court an objection taken during the trial to the admission of evidence, the point must be made, and properly saved by some bill of exceptions. It is not enough merely to note the objection and exception in the certificate of evidence." There is, however, nothing in the opinion touching it. The same holding is found in the syllabus in *Poling* v. *Railroad Co.*, 38 W. Va. 645 (18 S. E. 782), 24 L. R. A. 215; but this holding is somewhat qualified by the statement on page 658, 38 W. Va., (page 786, 18 S. E.), and page 222, 24 L. R. A., that the point "must in some way be so set out as to be capable of being easily found and identified." So, according to that case, if the particular point can be identified,—safely picked out of the mass,—it is allowable to do so, and save the excepting party the benefit of his point, as was intended by the circuit court, and by the party himself, and by the statute. The case of *Gregory's Adm'r* v. *Railroad Co.*, 37 W. Va. 606 (16 S. E. 819), does

not settle the precise point. It holds that where a party moves to set aside a verdict on certain specific grounds, not mentioning others, he waives the others, unless he has made those others the subject of bills of exceptions; that where it is claimed that evidence has been improperly admitted, and exception noted, but no bill of exceptions taken, and the record states that the motion for a new trial was based on certain specific grounds, not naming the admission of such evidence, that exception will be considered as waived in the Appellate Court. It is to be noted that on page 609, 37 W. Va., and page 820, 16 S. E., it is stated in the opinion that, "if the motion for a new trial had stated that it was based on the improper admission of such evidence, then we could say that the statement in the certificate of evidence that the party had objected and excepted to its admission would be sufficient, without a bill of exceptions."

The question before us is, what shall this Appellate Court adopt as a rule of practice, under the statute mentioned above, as regards objections and rulings and exceptions merely noted in the stenographic report of the proceedings and evidence in a trial? Must the party complaining, who has objected and excepted to the courts' rulings, wholly lose his point because he did not take a formal bill of exceptions, as the Virginia court decided in cases above cited? Why shall he do so, when we can safely find his point? Would not that defeat the purposes of this statute? Is it not intended to portray all the events of the trial? As the trial is taken down, it saves time and great labor to utilize the report for the purpose of showing the thing taking place during its progress. The statute is here, and is acted on, and the report is made official by it. But, on the other hand, here is a great volume of questions, answers, and proceedings, and it is utterly out of the question to ask an Appellate Court to grope through the labyrinth of matters contained in the report, questions, objections, answers, remarks of counsel and judge, documents, etc., without some guiding specification. To do so would involve a consumption of time, labor on the Court, and, worse yet, great danger of missing the real point or matter complained of as error. My conclusion is that, if the assign-

ment of error or brief of counsel clearly and distinctly specifies the question refused or allowed,—the particular point complained of, with a specification of its place in the report of the proceedings,—this Court ought to consider it; otherwise, not. This much ought to be required of the counsel who make the complaint, and who ought to put the finger on the points of complaint; he being well versed in the case, and knowing his grievance. Of course, if there is such specification embodied in the motion for a new trial, that will answer; but a mere general statement that the new trial is asked on the ground that the verdict is contrary to the evidence, or because of the admission of improper evidence, or because of the rejection of proper evidence, will not do. But what as to the circuit court? How is it to be protected from the obligation to wander through the great mass of proceedings in a long trial? The evil is not so great in that court, because the judge has witnessed the trial, made notes of the questionable points, and most likely in every case the particular points are specified at the bar by counsel on the motion for a new trial; and if not so specified, as they should be, the judge can demand that they be specified, if he feels the need of specification to refresh his memory and recall the particular points to his mind. There are numerous cases which, though not just on this point, yet show that all that should be required to save a party his point is that it shall definitely appear on the record what is the point aggrieving him, and that he saved his point, and did not waive it. *Hughes* v. *Frum*, 41 W. Va. 453, (23 S. E. 604); *Perry* v. *Horn*, 22 W. Va. 381; *Bank* v. *Showacre*, 26 W. Va. 48; *Sweeney* v. *Baker*, 13 W. Va. 158; *Wickes* v. *Railroad* Co., 14 W. Va. 157.

Following this ruling, the assignment of error points out that witness Scott was asked, if a map was correctly made of the location of the railroad, to tell the jury what damages Mrs. Kay sustained by reason of the road, and was allowed to answer, over objection, that he understood that he "should take into consideration all the damage to Mrs. Kay's property that would originate from this road, and not the damage to the tract generally." The objection is stated to be that the witness was valuing damage to the property that had been done, and what might be done in

future from fires that might happen. I think this specification is sufficient, under the principles above stated, to call upon us to consider the point; and this involves a very important question, which, so far as I know, remains undecided in this State, and that is whether, in assessing compensation in condemnation proceedings, or in an action like this, for damages for taking land and using it for railroad purposes, other than that condemned therefor, danger from future fires caused by the locomotives on the road can be considered. The authorities conflict. 3 Elliott, R. R. § 996 (a late and very able work on the subject), states the law to be that "the increased danger from fire emitted from the locomotives, the increased cost of insuring buildings and their contents, * * * have been held proper subjects for compensation in damages." There is no doubt but that such is the preponderance of authority. Mills. Em. Dom. § 163, says: "Among the damages occasioned by the location of a railroad on a portion of land is the exposure of the crops and buildings on the land to fire, from the sparks emitted from passing trains. The apprehension of fire is an element of damages, notwithstanding the railroad company may be compelled by law to answer all damages, whether resulting from negligence or not. The owner may prudently insure, notwithstanding the liability of the company to pay damages. The adjacency of the road to the property is an increase of risk, and increases the cost of insurance. Increase of cost of insurance diminishes the value of the buildings. An action against a railroad company for damages caused by fire is a poor substitute for insurance. The owner may select his insurance company, but cannot select his railroad. The present value of building for purposes of residence or for sale is diminished by the effect of a constant liability to fire on account of proximity to a railroad. The danger, to be considered, must be real and imminent, and will not be considered when buildings are at some distance from the railroad. If the danger is such as render it advisable to remove the buildings, the cost of removal is a proper subject of damages. A secretary of an insurance company can give an estimate of damages from the increase of the rate of insurance, and can also testify that his company

had refused the risk on account of increased hazard. In some states the doctrine is denied, because of the uncertain and contingent nature of the damages, and because the railroad would be responsible for fires caused by negligence. Railroad companies are not responsible for accidental fires, unless guilty of some negligence, and it is not negligence to employ locomotives." Lewis, Em. Dom. § 497, says: "When a part of a tract is taken for railroad purposes, danger from fire to buildings, fences, timber, or crops upon the remainder, in so far as it depreciates the value of the property, may be properly considered. It is immaterial that the railroad company is made absolutely liable for all losses by fire which originate from the operation of the road, whether from negligence or otherwise. Such a liability would doubtless render the depreciation in value less than in cases where the company was liable only for fires resulting from negligence. It is to be borne in mind that compensation is not to be given for increased exposure to fire, nor for increased insurance rates, nor for probable losses by fire in the future for which no recovery can be had, but simply for depreciation in the value of the property by reason of danger from fire. The evidence should be limited to showing all the facts in regard to the situation of the property and improvements relatively to the railroad, and perhaps to showing the distance from the road to which the danger extends." Under these authorities, the question is, is the value of the property lessened by the reasonable apprehension of damage from fire caused by the operation of the road? And, if so, the amount of that depreciation. Note, however, that such danger must be such as, under all the circumstances, may be reasonably apprehended, not remotely chanceful or hazardous. The danger must be real, imminent, not mere possible danger. *Hatch* v. *Railroad Co.*, 18 Ohio St. 92; *Jones* v. *Railroad Co.*, 68 Ill. 380; *Proprietors of Locks and Canals* v. *Nashua and L. R. Co.*, 10 Cush. 385; *Railroad Co.* v. *Waldron*, 88 Am. Dec. 116; *Colvill* v. *Railroad Co.*, 19 Minn. 288, (Gil. 240); *Adden* v. *Railroad Co.*, 55 N. H. 415. In *Railroad Co.* v. *Ross*, (Kan. Sup.) 20 Pac. 197, and in *Railroad Co.* v. *Kregelo*, 32 Kan. 608, 5 Pac. 15, the Kansas court held that, while danger from fire is to be

taken into consideration as an element of damage, yet, "it is competent only to take into consideration the risk of fire set out by the railroad company without its fault, and by reason of the operation of the road through the premises. For fires occuring by its negligence the company is liable in a proper action instituted therefor and this element should not be taken into account in estimating the damages." This distinction seems to me reasonable. We must not anticipate the occurrence of fire from the misconduct and negligence of the company's employes; for that would be purely guesswork, speculative and not to be presumed, and until it occurs no damage results therefrom, and then the company is liable, whereas it may be reasonable to anticipate and expect fires damaging forests, houses, barns, and hay or wheat stacks, in times of drought, from the mere operation of the road, without negligence. We ought no more to anticipate negligence in the future from the operation of the road than we anticipate negligence in the improper construction of the road in assessing damages in condemnation proceedings, and such damages are never allowed. This railroad ran through timber lands of Mrs. Kay, and did set fire to fencing, and destroyed considerable fencing, and injured her timber. This had really happened, and therefore we can by no means say that evidence bearing on the question of damages from dangers of fire in the future was improperly admitted.

Complaint is made that witness Scott was allowed to answer certain questions on a certain page of the stenographer's notes, and others "as shown in the record." I do not find the questions. The specification is too indefinite.

As to the complaint that evidence of John Dillon and others was improper: No point is specified, except the general one that they did not know what they were talking about, for want of knowledge. That was a question for the jury, as to the weight of the evidence, not a question of admissibility.

As to the complaint that the jury disregarded the award made by arbitrators as to the damages: The award is lost from the record. Moreover, it was not binding on Mrs. Kay, as no evidence is shown of authority on the part of

her husband to sign it for her, and it was never carried into judgment.

As to the complaint that there was no evidence to show that the fire that burned fencing and damaged timber came from the defendants' locomotive: Turner Ransom's evidence was before the jury, and, to say the least, was some evidence on the subject; and we cannot set aside the verdict for that cause. I think it is enough to fairly impute the fire to the locomotive of the company. The jury passed on the question of negligence. If anything was allowed on that score, it is probably under one hundred dollars; and, therefore, if there were error in that, that alone would not justify reversal.

As to the refusal to allow Carpenter to answer the question first asked on page 83 of stenographer's notes: The original notes are not before us. The specification is too indefinite. If it refers to what Kay said, there is a want of authority to bind his wife to his declaration.

As to the refusal to allow Wright to answer the question, "What did William Kay tell you, at the time this award was made by the arbitrators, in regard to it?" There is no authority in Kay shown to bind his wife.

As to striking out the answer of Boxley, on page 102 of stenographer's notes, not before us: Guessing at it, he says that Carpenter and Wright were to meet, to go over the line and get Kay to consent to the construction of the road, but failed to do so, and he then agreed that the construction should be proceeded with, and, if they could not agree on the compensation, the matter should be arbitrated. How does the exclusion of this answer prejudice the defendant? It only shows the agreement of the husband to arbitrate, and his authority to do so is not shown. Suppose the plaintiff had agreed to do so, but failed to finally agree to it; it would not preclude this action.

As to the refusal to allow Scott to answer certain questions: They are not sufficiently specified, under above principles. I am not sure, that I could find them, except by guesswork.

In addition, as to all these questions which the court refused to allow to be answered, they cannot be considered, for the reason that the answers are not given, nor is it

stated what was expected to be proven by the answers. How can we say what the answers would be,—material or immaterial, relevant or irrelevant? We cannot say the party is aggrieved by the refusal. In *Jackson* v. *Hough*, 38 W. Va. 236, (18 S. E. 575), is the syllabus: "Where a question is not allowed to be answered by a witness and it does not itself import that its answer will prove a fact material, and it does not otherwise so appear, the refusal to allow it to be answered will not be ground of reversal." In *Childress' Adm'x* v. *Railway Co.*, 94 Va. 186, (26 S. E. 424), the rule of practice is stated to be that if an exception for allowing or refusing to allow a question to be answered by a witness "fails to give the answer of the witness, or what is expected to be proved by him, the appellate court cannot determine the relevancy, admissibility, or value of the answer, and the exception will not be considered." The same is held in *Insurance Co.* v. *Pollard*, 94 Va. 146, (26 S. E. 421), 36 L. R. A. 271, and *Kimball* v. *Carter*, 95 Va. 77, (27 S. E. 823), 38 L. R. A. 570, and *Railway Co.* v. *Reiger*, 95 Va. 418, (28 S. E. 590), and *Beirne* v. *Rosser*, 26 Grat. 537.

The last ground of complaint against the judgment is that the verdict for one thousand dollars against the company is excessive. I cannot myself help saying that, from what I can glean from the cold paper view of the case, I regard the verdict as high and onerous in amount,—beyond just compensation. The company occupies three and seventy-eight-hundredths acres of the plaintiff's land, all in woods, on a steep mountain side; very, very rough; of almost no value for farming purposes; placed by most of the witnesses at low value,—one of the most intelligent of plaintiff's witnesses putting it at four dollars or five dollars per acre. For that land, of course, the plaintiff must have pay, but I can hardly see, on the evidence, that the residue of the land is not worth as much for all purposes as before the railroad went there; and that is the test. *Board of Education* v. *Kanawha and M. R. Co.*, 44 W. Va. 71, (29 S. E. 503). But I may be wrong in this conception, and that I am wrong is attested by the verdict of twelve men, approved by a competent circuit judge, all of whom were present, and experienced the practical showing of the trial,

and are more competent to judge than I am from mere paper. And I must not forget or disregard very material evidence entering into this question of damages. The plaintiff's claim is that from the construction of the road on her land on the steep mountain side, by making a switchback, her land is cut up and separated, and deep cuts have been made and thereby outlet for her timber as well as coal has been destroyed; that rocks and other debris from coal mining have no place of deposit on the steep mountain side, but would slide into the railroad; and that there is no place for loading the coal or timber and it cannot be got out, except with expensive structures. If this be so, of course the damage is serious, and there was very considerable evidence to show this. Evidence on the plaintiff's side fixes the maximum damage at one thousand three hundred dollars and on the defendant's side at practically nothing. In truth the valuation is mere matter of estimate or opinion on both sides. Opinion evidence, however, is in such cases admissible,—in fact, in most cases controlling, in connection with the facts and circumstances. *Blair* v. *City of Charleston*. 43 W. Va. 62, (26 S. E. 341), 35 L. R. A. 852; *Railroad Co.* v. *Foreman*, 24 W. Va. 662; *Hargreaves* v. *Kimberly*, 26 W. Va. 797. A farmer not knowing the market value of real estate, not living in the neighborhood of the particular land, and who does not know its situation, fertility, advantages, and disadvantages, cannot give his opinion as to the value of the land before and after the appropriation of the right of way by a railroad company, as it is not a question of expert evidence; but a farmer conversant with the land, as to its situation, soil, advantages, etc., may state the facts, circumstances, and respects in which the land is benefitted or injured, and in connection therewith may state his opinion of the value of the land before, as compared with its value after, the appropriation of the right of way by a railroad company. He may not express his mere naked opinion of the amount of damages caused by the work, but must state his opinion of the value of the land before and after the construction of the railroad, in connection with the facts and circumstances relative to the land flowing from the construction of the railroad. Where the law fixes a standard of estimation of

damages, and a jury departs from it, the verdict must be set aside; but I do not see that such is the case in this instance, and therefore the Court cannot interfere with the verdict of the jury, unless it be so large or small as to enforce upon the Court the conviction that the jury acted under the impulse of some improper motive or some gross error, or a misconception of the subject. *Railroad Co.* v. *Shott*, 92 Va. 34, (22 S. E. 811); *Railroad Co.* v. *Nighbert*, 46 W. Va. 202, (32 S. E. 1032). These views result in the affirmance of the judgment.

Affirmed.

CHARLESTON.

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CALVERT v. ASH *et al.*

Submitted January 13, 1900.—Decided March 24, 1900.

1. PARTIES—*Judgment Lien—Bill—Review.*

Where a suit in equity is brought by a party to enforce his judgment lein against real estate which his debtor holds jointly with another, and both of the owners of said real estate are made parties to the suit, and served with process, although no allegation is made or lien asserted against the party holding said real estate jointly with such judgment debtor, and the cause being referred to a commissionner to ascertain the liens existing against said real estate, and their priorities, who reports a judgment lien existing against the real estate belonging to said party who is not the judgment debtor mentioned in the bill, it is error to decree a sale of the entire property, and such decree may be set aside by bill of review filed in proper time. (p. 487).

2.—PURCHASER—*Caveat Emptor.*

Caveat emptor applies to a purchaser at a judicial sale. (p. 486).

3. PURCHASER—*Necessary Parties.*

A purchaser at a judicial sale is not protected by section 8 of chapter 132 of the Code when the record of the suit shows that necessary parties interested in the property sold, having liens thereon, were not before the court when said sale was ordered and confirmed. (pp. 485-486).

4. DECREE—*Sale.*

A decree rendered in the circumstances of this case is an entirety, and the entire decree and sale made thereunder will be set aside. (pp. 486-487).

Appeal from Circuit Court, Cabell County.

Bill by M. A. Calvert against Harrison Ash and others. Decree for plaintiff, and John B. Coleman appeals.

Affirmed.

PAYNE & PAYNE, for appellant.

A. C. BLAIR and J. W. KENNEDY, for appellees.

ENGLISH, JUDGE:

Harrison Ash and George Bond were joint owners of certain real estate in Kanawha County. On the 15th of January, 1897, M. A. Calvert obtained a judgment against said Ash before a justice of the peace of said county for forty-seven dollars and twenty cents, with interest from that date, and costs, upon which judgment execution was issued, and returned "No property found." On the 2d of April, 1896, said Ash and Bond executed a deed of trust upon said real estate to secure to McNabb & Co., certain notes described in said deed of trust, which was duly recorded. M. A. Calvert filed a bill in equity in the Kanawha circuit court at May rules, 1897, making said Ash, Bond, Sylvester Chapman, trustee, Alexander McNabb, and B. H. Early, of McNabb & Co., parties defendant, setting forth the facts in reference to obtaining said judgment, issuing execution, and the return of "No property;" also as to the execution of said deed of trust, but alleging that the amounts secured by said deed of trust were fictitious and untrue; that said Ash and Bond never owed McNabb & Co. the amount of said notes, or any considerable part thereof; and that said deed of trust was made to delay, hinder, and defraud the creditors of said Ash and Bond,

and the creditors of each of them; that Ash and Bond were insolvent, and said trust deed operated as a preference to McNabb & Co.; that any amount Ash and Bond may have owed McNabb & Co,. if anything, at the date of said deed of trust, had long since been paid; that said judgment was a lien upon the real estate of said Harrison Ash, and that the rents, issues, and profits thereof would not pay off the lien, costs, and taxes thereon within five years; and prayed that said deed of trust executed by Ash and Bond to Sylvester Chapman, trustee, might be set aside, and held for naught, so far as it affected the debt of plaintiff, and that said real estate of Harrison Ash might be sold to satisfy the plaintiff's judgment. The cause was referred to a commissioner to ascertain and report the real estate owned by the defendant, Harrison Ash, the liens against the same, and the amounts and priorities thereof, and whether the rents, issues, and profits of said real estate would discharge the liens against the same within five years. In pursuance of this decree the commissioner reported the liens existing, and their priorities, and that the rents, issues, and profits arising from said estate would not pay off the liens thereof within five years, mentioning several parties as holding liens against said real estate, who were not made parties to the suit; which report, being unexcepted to, was approved and confirmed. Among the liens reported was a judgment recovered by John W. Watson & Co. against Ash and Bond for five hundred and forty-four dollars and sixty-five cents, and costs, twenty dollars and eighty-six cents, which judgment the court decreed to be a first lien on the undivided one-half interest of the defendant Bond in said real estate, set aside said deed of trust so far as it affected the said judgment creditors, and directed unless said Ash and Bond, or some one for them, should pay off said debts against them within thirty days, that a special commissioner therein named should make sale of said real estate upon the terms and in the manner therein prescribed. In pursuance of this decree, said special commissioner sold for three hundred dollars said real estate to one John B. Coleman, who complied with the terms of sale. The sale was reported to the court, and confirmed, and a writ of possession was issued to place

said purchaser in possession of the property. On the 28th of March, 1899, said Ash, Bond, Sylvester Chapman, trustee, Alexander McNabb, and B. H. Early presented a bill of review against M. A. Calvert and others, alleging, among other things, that the only purposes and object of the original bill were to enforce the judgment of said Calvert against H. Ash, and to have declared void said trust deed in favor of McNabb & Co. as to the judgment of M. A. Calvert; that no claim was made in said original bill in favor of any one against the real estate of said Bond, the prayer of said original bill being to sell the real estate of said Ash in satisfaction of Calvert's judgment; and no relief was asked against said Bond in respect to his interest in said real estate, there being no prayer to sell his real estate in satisfaction of any claim; that said decree was, therefore, void so far as it decreed the sale of Bond's interest in said real estate, and no title passed to Coleman by reason of the decree and sale, or of the confirmation of said sale and commissioner's deed as to entitle him to possession of said real estate. The plaintiff also alleged that the commissioner has no authority or jurisdiction within the scope of the original bill to report the claim of Watson & Co. against Bond, or to report the same as a lien against his interest in the land, and decree a sale of it in satisfaction thereof; that proper parties were not before the court; that one member of the firm of McNabb & Co., viz., J. B. Chapman, was not made a party; that the original bill was taken for confessed, and that Bond knew nothing of said decree and sale of his interest in said real estate until the writ of possession went into the sheriff's hands; and the plaintiffs prayed that the decree confirming said report, and decreeing a sale of said real estate, and holding said deed of trust in favor of McNabb & Co. to be fraudulent, as well as the decree confirming said sale, be reversed and set aside, the sale thereunder be declared null and void, as well as the deed to Coleman, and that the sheriff of Kanawha county be restrained and enjoined from executing said writ of possession until the matters arising on said bill of review have been heard and determined. The defendants demurred to the bill of review, and Coleman filed his answer to the same, which answer the plaintiffs moved

to strike out, which was accordingly done, as insufficient in law, and the court decreed that the decree entered in the original cause on June 15, 1898, be set aside, and the sale made thereunder on the 1st of October, 1898, as well as the decree confirming the same, entered October 5th in said original cause, be set aside, vacated, and held for naught, and that the deed from W. D. Payne, special commissioner, to John B. Coleman, for said real estate, be cancelled, set aside, and held for naught, and the injunction awarded therein be perpetuated; and from this decree Coleman obtained this appeal.

The first error relied on is that the court erred in setting aside the decree of sale and the sale made thereunder to appellant. Did the court so err? There can be but one answer to this question. The original bill sought no relief against the real estate of the defendant Bond; no claim was asserted against it, and the court was not asked to subject it to any lien, or sell it for any purpose whatever. It is true, a trust lien recorded against the real estate of Ash and Bond was sought to be removed on the ground that the same was fraudulent, but it is apparent this was prayed for merely that the interest of Ash might be subjected to the plaintiff's lien after being freed from this fraudulent trust. No matter how carefully the defendant Bond had read the bill, he would have found nothing indicating a wish or intention to subject his land to sale. The prayer of the original bill was that the trust deed be set aside, so far as it interfered with the plaintiff's claim, and to subject the real estate of Ash—not that of Bond—to the payment of plaintiff's lien. From the commissioner's report in this cause it appears that E. Callahan has a judgment lien against Harrison Ash for ninety-two dollars and fourteen cents, which is the first lien on his real estate; that Coleman has a judgment for one hundred and eight dollars and forty-four cents, which constitutes the third lien on said real estate; that William Reynolds has a judgment for seventy dollars and eighty-five cents against Coleman and Ash, which is reported as the fourth lien on said land; that John W. Watson & Co. have a judgment against Ash and Bond for five hundred and forty-four dollars and sixty-five cents, with interest and costs, which is reported as the

first on the one-half interest of George Bond in said land. Now, it does not appear that said judgment creditors, E. Callahan, J. B. Coleman, or William Reynolds came in by petition, and asserted their liens, or asked in any manner to be parties to the suit, or that said lienors presented and proved their judgment liens. Section 7 of chapter 139 of the Code provides that "every such lien holder, whether he be named as a party to the suit or not, or whether he be served with process therein or not, may present, prove and have allowed any claim he may have against the judgment debtor which is a lien on such real estate or any part thereof, and from and after the time he presents any such claim he shall be deemed a party plaintiff in such suit." My interpretation of this statute is that he must present and prove his claim, which is ordinarily done by petition. How the commissioner ascertained these liens does not appear. It may have been done by reference to the record, but there is nothing to show that the lienors presented them to the commissioner in any manner; and the statute does not intend that the act of the commissioner in searching the record and thus reporting the liens shall make the lienors parties to the suit. The statute says "parties plaintiff," and so they would be if they filed petitions, presented their claims, and prayed that they be given their proper priority as lienors; and, for aught that appears in this case, these judgments may be entitled to credits. Neither of these lienors can be considered in any sense as parties plaintiff to this suit. The other members of the Court do not agree with me upon this proposition, but this fact does not change the result, as J. B. Chapman, one of the firm of McNabb & Co., was not made a party, which firm held a lien on said property. In the case of *Underwood's Ex'r* v. *Pack*, 23 W. Va. 704, it was held that "a purchaser at a judicial sale is not protected by section 8 of chapter 132 of the Code, when the record of the suit shows that necessary parties interested in the property sold, having liens thereon, were not before the court when said sale was ordered." See, also, *Newcomb* v. *Brooks*, 16 W. Va. 66, 67. In *Pappenheimer* v. *Roberts*, 24 W. Va. 712, WOODS J., delivering the opinion of the Court, said: "It is clear that the purchaser would not be protected under

said section if parties shown by the record of the suit to be interested in the property by having liens thereon were not before the court." See, also, *Hull* v. *Hull's Heirs*, 26 W. Va. 30, and the authorities there cited. Applying the principles announced in the authorities above quoted and referred to, we are led to the conclusion that the purchaser, John B. Coleman, is not protected by section 8 of chapter 132 of the Code; neither can he complain if the decree under which he became a purchaseer conferred no title on him. 2 Bart. Ch. Prac. 1190, § 347, says: "The rule *caveat emptor* applies in all its rigor to judicial sales, and, in the absence of mistake or fraud, the consequence of which we have considered, the buyer must look out for himself. He buys at his own risk, both as to title and quality. As we have seen, his bid at the commissioner's sale is a mere offer; and although, after confirmation, his title relates back to the day of sale, yet he has until confirmation to examine into the title, and to inquire if there be any defects in the proceeding." In *Bank v. Hyer* (decided March, 1899) 32 S. E. 1000, this Court held that a purchaser under a decree is held to know its contents, and what property or estate he is to acquire. See, also, *Hoback* v. *Miller*, 44 W. Va. 635, (29 S. E. 1014), and *Williamson* v. *Jones*, 43 W. Va. 563, (27 S. E. 411), 38 L. R. A. 694. In the case at bar it seems that process was served on Bond, and he was made a party to the suit, although no lien was asserted in the bill against his land, and no sale thereof was prayed for. In these circumstances the decree directing the sale of his land was an erroneous one. While the court had jurisdiction of Bond by service of process, the bill asked for no relief against the land, and the court, in the absence of any allegation showing any lien or liability against Bond's estate, or any prayer for its sale, clearly erred in directing the sale of said realty. The decree was a joint one against the land of Ash and Bond, and the sale under it a sale of the entire property. The case of *Gray* v. *Stuart*, 33 Grat. 351, draws a distinction between an erroneous judgment and a void one. The first is there held to be a valid judgment until reversed, provided it is the judgment of a court of competent jurisdiction. The latter is no judgment at all; it is a mere nullity.

The first cannot be assailed in any court but an appellate court. The latter may be assailed in any court anywhere, whenever any claim is made or right asserted under it. The decree directing the sale of this real estate must be regarded as an entirety, although it was an erroneous decree. The appellant became the purchaser, not of a part, but of the entire property sold under the decree. I am, therefore, of opinion, that the circuit court committed no error in striking out the answer of appellant to the bill of review, or in setting aside the entire decree rendered in the original cause on the 15th of June, 1898, directing the sale of said real estate, the sale made thereunder on the 1st of October, 1898, and the decree entered on the 5th of October, 1898, confirming the same, or in canceling the deed of conveyance made to appellant by said special commissioner. The decree is affirmed. But nothing herein contained is to preclude the purchaser, John B. Coleman, from applying to the circuit court of Kanawha County for restitution of the purchase money paid by him.

Affirmed.

CHARLESTON.

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MYERS v. MYERS.

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Submitted January 30, 1900—Decided March 24, 1900.

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1. GUARDIAN—*Ward—Resulting Trust.*

To create a resulting trust in favor of a ward in a tract of land purchased by his guardian, the trust funds must either have been paid at the time of, or entered into the consideration for the contract of purchase, thongh afterwards paid. (p. 490).

2. PURCHASE BY GUARDIAN—*Wards—Funds.*

If a guardian purchases a tract of land with her own money and on her own credit, and takes the deed in her own name, the mere fact that she satisfies the unpaid purchase money out of the guardianship funds, which afterwards come into her hands, cannot create a resulting trust in favor of her wards. A court of equity, in a proper case, may treat such funds so used, and to the extent thereof, as a charge against the land. (pp. 490-491).

3. GUARDIAN—*Funds—Necessaries.*

A guardian, having no funds legally applicable thereto, who furnishes necessaries to his ward, has the same right to enforcement and reimbursement thereof as any other person furnishing such necessaries. (p. 494).

4. EQUITY—*Litigation Unjust.*

A court of equity will not countenance the unjust litigation of an undutiful son against his mother, although she is his legal guardian. (p. 496).

Appeal from Circuit Court, Harrison County.

Bill by Jefferson Myers against Laura A. Myers. Decree for defendant, and plaintiff appeals.

Affirmed.

HARVEY W. HARMER, for appellant.

JOHN BASSELL and EDWIN MAXWELL, for appellee.

DENT, PRESIDENT:

In the circuit court of Harrison County, Jefferson Myers, son, brings a suit against Laura A. Myers, mother and guardian, to enforce an alleged resulting trust in a tract of seventy-nine acres of land owned by the latter. The circuit court found against the son, and he appeals.

The facts are as follows: In 1874, John C. Myers died, leaving a widow, the defendant, and five sons, of which the plaintiff was one, at that time about one year old. He left a small amount of personal property, and some real estate heavily incumbered with debts. His father qualified as his administrator, and proceeded to sell his property and pay his debts. About the year 1878 the defendant received from the estate her dower, amounting to one thousand and eighty-seven dollars and fifty cents. She used a portion in maintaining herself and children, and on the 25th of

March, 1879, she purchased a small tract of land, containing seventy-nine acres, at the price of one thousand three hundred dollars, seven hundred and twenty-eight dollars of which she paid cash in hand, being the residue of her dower, and gave her three notes, one for one hundred and seventy-two dollars, and the others for two hundred dollars, each, payable annually. Some time afterwards she borrowed the money, and paid off these notes, and gave a deed of trust on the land to secure this loan. In the year 1883 she received in round numbers, for her five sons, about eight hundred dollars, being the balance on the sale of the real estate after payment of debts. This money she used in paying off the trust deed. In 1884 she settled her accounts as guardian of the plaintiff before a commissioner, who found, after deducting proper credits, a balance of one hundred and one dollars and forty-three cents due the plaintiff, subject to a printer's fee of one dollar and fifty cents; leaving in her hands, as such guardian, a net balance of ninety-nine dollars and ninety-three cents. Plaintiff was at that time, and had been, living with his mother, and supported by her since his father's death. About this time he began to work out and live with others, but was at home off and on. He went over in Tucker County to work, and in 1890 he was brought home an invalid, having been injured in the mines, and his mother received him and nursed him back to health, and paid his physician's bills. She also paid some store bills for him, and, after he was able, sent him to a private school, and paid his tuition. He wanting to buy a horse from her, she gave it to him. She settled with all the other children satisfactorily when they became of age. He made no demand on her, and she considered his claim fully settled by the services she had rendered him and the money she had paid out for him. At length, about the time of the institution of this suit, oil developments reached this land. The plaintiff conceived the idea of setting up a resulting trust therein on account of his money used by his mother in the payment of the trust lien against the same. He filed his bill. She answered, denying his right to any interest in the land, insisting that she owed him nothing, by reason of her services and the expenditures aforesaid, and alleged

her willingness and ability to pay any amount that might be found due plaintiff on a fair settlement any time. The only evidence on which the plaintiff founds his claim for a resulting trust is that of George W. McKeown, the vendor from whom his mother purchased the land, and is to the effect that she said she had no money to pay the deferred payments, but that Jacob Myers had the children's money, and that was the money with which she expected to meet the payments. In the case of *Lehman* v. *Lewis*, 62 Ala. 133, it is said: "The general rule is that, when a resulting trust is sought to be established and ingrafted upon a conveyance absolute in its terms, the complainant must by his bill distinctly and precisely aver the facts from which it is claimed to result. The proof must correspond with the pleading, and must be clear, full, satisfactory, and convincing. If the proof is uncertain, if it is doubtful and unsatisfactory, relief cannot be granted. The presumption arising from the conveyance, that it fully speaks the whole truth, must prevail until the contrary is established beyond reasonable controversy. The burden of removing this presumption rests upon the party asserting the contrary, and it is not enough for him to generate doubt and uncertainty. 'A judgment of the court, a deliberate deed or writing, are of too much solemnity to be brushed away by loose and inconclusive evidence.' *Howland* v. *Blake*, 97 U. S. 626, 24 L. Ed. 1027." 10 Am. & Eng. Enc. Law, 49. In the case of *Webb* v. *Bailey*, 41 W. Va. 463 (23 S. E. 644), it was held that the time of payment made no difference, provided it was made in pursuance of the contract of purchase; that is to say, that, if the contract was entered into with the understanding that the trust funds were the source of payment, then a resulting trust would follow. But if the property is purchased with funds, and on the credit, of the purchaser, and she takes the title in her own name, and afterwards uses the trust fund in payment of her indebtedness for the land, there can be no resulting trust, although, in case of her insolvency or lack of security, the land might be charged with the amount of the fund used, except in the hands of an innocent purchaser without notice, as equity will follow trust funds so long as they can be identified

without injury to innocent third parties. The trust must be coeval with the transfer of the property, or it can have no existence at all. In the case of *French* v. *Sheplor*, 83 Ind. 266, it is held: "Where a guardian purchases lands for himself, upon his own credit, and takes a conveyance, and afterwards, in violation of his duty, uses the money of his wards in payment of the purchase money, no trust in the lands results or arises in favor of the wards."

The defendant purchased this land in her own name, used her own money in part payment thereof, and her credit and a lien on the land for the residue, and afterwards borrowed the money to satisfy this lien, and gave a deed of trust to secure the same, and then, as guardian, used an inconsiderable amount of the plaintiff's money to discharge the trust lien, but is able and has held herself ready and willing, at all times to account to him for it. The mere fact that she told the truth to her vendor, that she had no other source to look to for the payment of her notes than the children's money in the hands of their grandfather, is not sufficient to create a resulting trust; for she did not in any manner bind these funds, or ever agree to pay them on such purchase money, but used only her individual credit, and the estate created by the investment of her own funds in the land. The vendor did not receive any of the guardianship funds, nor did he bind himself or agree to look to them for payment. He was amply secured without doing so. Hence the guardianship funds did not enter into the contract of purchase, and therefore no resulting trust could arise by reason of their after use. The circuit court committed no error in holding that the plaintiff was not entitled to the specific relief sought.

The plaintiff's counsel insists that the court erred in not directing an account under the prayer for general relief. The court's order is as follows: "Upon consideration whereof, it appears to the court that the plaintiff is not entitled to the specific relief prayed for in his bill, in so far as the same seeks to set up an implied or resulting trust as against the defendant, and, the plaintiff not asking to prosecute his suit for any other matter alleged in his bill, it is adjudged, ordered, and decreed that the

plaintiff's bill be dismissed, but without prejudice," etc. From this it is plain the circuit court gave the plaintiff opportunity to have an account if he wish it, but, he declining it, the court could do nothing else but dismiss. Nor is it plain that the plaintiff was entitled to an account. According to his own evidence, his mother had offered him many times the amount she could possibly have been indebted to him not to sue her or abandon his suit, and he refused to accept it. She says, on the other hand, that she owed him nothing, but, on a fair settlement of accounts, he would be indebted to her. Up until he was about eleven years of age she had to support and care for him, and used her dower estate in so doing. No doubt she many times denied herself the actual necessities of life, that her children might be provided for to the full extent of her ability. Then she received his patrimony, amounting to ninety-nine dollars and ninety-three cents. The interest of this sum she was intitled to use in his maintenance, and reimbursing herself for excess of expenditures. Six dollars per annum for a mother's love and care! He complains she did not make annual settlements. The taxes, costs, and expenses of such settlements would more than have devoured the income of his estate, and left nothing for his maintenance. The letter of the law must bend to its spirit, and equity will not require a literal compliance therewith to the injury of both guardian and ward. *Maguire* v. *Doonan*, 24 W. Va. 507. It must be considered, then, that the mother had the right and did use the interest on his estate in his behalf. That would still leave in her hands, unaccounted for, ninety-nine dollars and ninety-three cents. In 1890, when he had almost reached his majority, and had passed out from under his mother's care, and was supporting himself, he was injured in the Tucker County mines, and brought back to his mother's care a helpless invalid. She was under no legal obligations to receive him, but she might have laid aside her motherly affection and treated him as he has seen fit to treat her in these proceedings,—as a stranger of strangers, without a tie of blood or kinship; but she received back his bruised and wounded body, and for twenty long weeks watched over him night and day, nursed him back to life and health

again, and was then compelled by him to pay even his store, doctor, and tuition bills, and when he wanted to purchase a horse of her she kindly made him a present of it. She claims that all this was more than a sufficient offset to the ninety-nine dollars and ninety-three cents, but he insists that her claim was a gift, and is barred by the statute of limitations. She claims that she only asks it as a credit on the ninety-nine dollars and ninety-three cents. He answers, "But you had no right to use this money during my infancy in paying my debts, and providing me with things absolutely necessary for my comfort and enjoyment, because you did not first obtain an order of court authorizing the expenditure of this fund, and you are therefore not entitled to any credit therefor." That is to say, when he was brought to her door, a helpless invalid, that she could not receive him, provide him with a physician, food, and medicine, and look to him for payment thereof, unless she first employed a lawyer, filed a petition in the circuit court, had a guardian *ad litem* appointed, took the necessary depositions, and had an order of the court entered, allowing her, after the payment of costs therefrom, to disburse the ninety-nine dollars and ninety-three cents, if there was any balance left. This law was never intended, in all its strictness, to apply to estates of small or inconsiderable value, or in cases of emergency or necessity. If it was, the sooner it is repealed or modified the better it will be for the children whom it was made to protect. It is the duty of a court of chancery, having jurisdiction of such matters, to so construe it as to make it operate with justice and equity. In short, the rules and principles of equity must be applied to it. He who seeks must do equity. An infant, without regard to guardianship, is liable for necessaries. Blackstone says an infant "may bind himself to pay for his necessary meat, drink, apparel, physic, and such other necessaries, and likewise for his good teaching and instruction, whereby he may profit himself afterwards." In 10 Am. & Eng. Enc. Law, 660, the law is stated to be: "There are some contracts manifestly for the benefit of the infant, where it would be detrimental to his interests not to be bound by them. Such contracts the law holds as binding as contracts between adults.

These contracts have to do with the existence and proper maintenance of the infant, and he might suffer severely if he could not pledge his credit for the supply of necessaries to h imself. Food, lodging, clothing, medical attendance, and education are the leading elements in the doctrine of necessaries." The mere fact that an infant is under guardianship, if he has no estate legally liable for his maintenance, does not destroy his liability for necessaries. And a guardian, without such estate, has the same right to furnish him such necessaries as any other individual. And the guardian, after his ward reaches his maturity, if he have no estate applicable to the payment of the same, may hold such ward personally responsible for necessaries furnished him during his minority. The fact that section 9, chapter 82, Code, provides, that neither the ward personally, nor his real estate, shall be liable for disbursements authorized by the court, does not destroy his common-law liability for necessities. Nor does the fact that, under section 8, the guardian cannot, in his guardianship settlements, be allowed his expenditures over and above the ward's annual income and the disbursements authorized by order of court, destroy the guardians' individual common-law right to hold his ward liable for necessaries furnished him for the payment of which there are no funds or estate in his hands legally liable. In Woerner, Guardianship, 187, it is said, "It is an old and familiar doctrine that infants and other persons under disability to contract are bound, nevertheless, for necessaries, to the extent of their reasonable value, to those who furnish them by reason of their need or at the request of the infant. * * * For necessaries so furnished by a guardian, he will be reimbursed out of the ward's estate." *Reading* v. *Wilson*, 38 N. J. Eq. 446; *Brent* v. *Grace's Adm'r*, 30 Mo. 253, 256; *Wallis* v. *Neale*, 43 W. Va. 529, (27 S. E. 227). The ward suing the guardian for a settlement after he reaches his majority, a court of equity will not require the guardian to establish his individual claim for necessaries at law, but, having jurisdiction for one purpose, will do complete justice between the parties. Nor will it allow a just claim for necessaries in excess of the funds in the guardian's hands, to the extent of such funds, to be barred

by the statute of limitations, but will presume from the lapse of time the ward was in bringing his suit, taken together with other circumstances, that the ward, on coming of age, acquiesced in the application of such funds to the payment of such necessaries. This is a very strong case for the application of this doctrine. The Plaintiff, when about nineteen years of age, was severely injured. He was taken to his mother's home. He required, as absolute necessities, shelter, nursing, medicine, clothing, and food for twenty weeks, and also while he was convalescing, she sent him to school, and gave him a horse; in all as she maintains amounting to four hundred and thirty dollars and sixty-four cents. For all this she made no charge except she expected it to be a satisfaction of the ninety-nine dollars and ninety-three cents that she had formerly used in his support and in payment of the deed of trust lien on the land. To his four brothers, on reaching their majority, she paid each one hundred and fifty dollars, which they received in full satisfaction of all claim against her, accepting it probably more as a gift from her than otherwise. When he reached his majority he said nothing to her about a settlement, nor she to him, as she had paid him as she claims far more than his portion. He awaits four years uncomplainingly, tacitly acquiescing in his mother's disposition of the matter, until the oil developments reached the neighborhood, when the greed for gain takes possession of his soul. Then he proceeds to harass his mother with this suit,—as unconscionable a suit, probably, as ever was instituted. The love of money is certainly the root of all evil, when it will destroy the filial obligation, duty, and affection which a son owes to his widowed mother, and cause him to seek to gain an undue advantage over his brothers. His mother told him, in effect: "The whole estate will belong to you boys when I am dead; then do not waste your money in useless litigation." But he cared not for the pain, sorrow, and humiliation that he might cause to her gray hairs, and forgot the years of anxious care and watching she had expended in his behalf, and the greed for gain crushed out all the nobler purposes of his heart, and closed his eyes to all the harmful consequences that might result to others. Money he wanted, and money he would have,

though the price he paid was a mother's love and his brothers' affection. A court of equity cannot disregard the tender relations of human life, and in all its decrees it should preserve and cherish them. It can give no countenance to the unjust cause of an undutiful son against a kind and forbearing mother. The decree is affirmed.

Affirmed.

CHARLESTON.

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STATE v. LILLY.

Submitted January 16, 1900.—Decided March 24, 1900.

1. CRIME—*Principal.*
   There can be no accessory to a crime not committed by a principal. (p. 497).

2. CRIME—*Accessory.*
   Under the laws of this state, to convict a person as an accessory to a crime, he must be indicted and tried as such. (p. 497).

3. PUNISHMENT—*Principal—Accessory.*
   A guilty principal cannot escape punishment because he is not guilty as an accessory. (p. 497).

4. TRIAL—*Jury Verdict.*
   Where two persons are indicted and tried jointly for the same offense, the same jury may, by separate verdicts, acquit the one and convict the other. (p. 498).

5. CRIME—*Evidence—Reasonable Doubt.*
   Where the crime of abortion is fully established, and the circumstantial evidence establishes beyond a reasonable doubt the guilt of the accused to the satisfaction of the jury, the verdict will not be set aside because the evidence fails to show the character of the instrument, or the time when used to produce the abortion. (pp. 498-499).

Error to Circuit Court, Kanawha County.

Sam. F Lilly was convicted of crime, and brings error.

Affirmed.

E. W. WILSON and A. B. LITTLEPAGE, for plaintiff in error.

EDGAR P. RUCKER, ATTY. GEN., and J. A. OLDFIELD, for the State.

DENT, JUDGE:

H. F. Craig and Sam F. Lilly were jointly indicted in the criminal court of Kanawha County for producing an abortion on A. F. McMillan. They were tried by the same jury. Craig was acquitted, and Lilly convicted. On a writ of error, Lilly insists that, according to the evidence, he was merely an accessory, and Craig, the principal, having been acquitted, he could not be convicted. If Lilly had been indicted as an accessory, his position would be tenable, for, to convict an accessory, the crime must have been committed by the principal; otherwise, there could not be an accessory. Where there is no crime there can be no complicity therein. *State* v. *Mainor*, 28 N. C. 340; *Maybush* v. *Com.* 29 Grat. 857; *Hatchett* v. *Com.*, 75 Grat. 925; 1 Am. & Eng. Enc. Law, (2d. Ed.) 269. But Lilly is not indicted or prosecuted as an accessory, but as a principal. Then the only question presented is as to whether there is sufficient evidence to justify the verdict of the jury. The evidence shows that an abortion was committed by some one. This is beyond dispute. The first count in the indictment charges that it was produced by the administration of the oil of tansy; the second, by a certain substance, the name and character of which are to the jurors unknown; the third, by a certain instrument, the description and name of which are to the jurors unknown; and the fourth count, by certain unknown means. These counts all appear to be good and sufficient under the law.

The main reason given for asking the acquittal of Lilly is that the witness A. F. McMillan swore that Dr. Craig used a sharp instrument upon her in the presence of Lilly. She says she felt no pain, and no water followed the insertion of such instrument. Dr. Craig testified that,

while he was present on the occasion referred to, he did not use any such instrument. The jury rejected the woman's testimony on this point, and acquitted the physician. This they were justified in doing. But the testimony shows plainly, beyond all reasonable doubt that an abortion was committed, as charged in the indictment, with a sharp instrument, to the jurors unknown. The woman, Dr. Craig, or Sam Lilly did it. Dr. Craig is acquitted. The woman testifies she did not do it herself. The jury has the, right to weigh her testimony, and reject such portions as they deem false, and accept such portions as they deem true. The proof of an abortion rests usually on circumstantial evidence. 1 Am. & Eng. Enc. Law (2d Ed.) 195.

The criminating circumtances against Lilly are as follows: Lilly had been living with the young woman (only eighteen years of age) in adultery. She had become pregnant by him. He administers drugs to her for the purpose of producing a miscarriage, which shows his desire and intent to get rid of his unborn child. He is present at her bedside on all occasions when physicians are called in. The abortion is produced. He is present to receive and dispose of the fetus. He compels the victim of his unhallowed lusts to go before a magistrate and take a false oath as to his administration of drugs to her with criminal intent. He has the law on the subject of abortion read to him, and claims that the law would justify what was done, and, after indictment, claims the trial would not amount to much, for the reason that the woman had sent him bows of her hair, and would not appear against him. The jury disbelieved the woman when she said Craig had produced the abortion, they believed her when she said she did not produce it herself, and, finding that neither she nor Craig produced it, there was but one other alternative,—to find that Lilly did do it. Dr. Aultz says that on examination he found the womb punctured, and every evidence of an abortion. He also says that this was in December, and that in October Lilly asked what he would take to cause a woman to miscarry. This evidence was uncontradicted, and tends to show that an instrument was used. It is not necessarry to show the character of the instrument.

Com. v. *Snow*, 116 Mass. 47. The crime, the motive, and the opportunity are shown, corroborated by previous attempts, the concealment of the evidence, the manufacturing and suppression of testimony by threats of violence, and other conduct amounting to almost absolute admissions of guilt. From all these taken together, it is impossible to see how the jury could have arrived at any other verdict, or how a stronger case of circumstantial evidence could have been made out, unless the jury had before hand become eyewitnesses of the perpetration of the crime. The evidence tends to show that the "jobbing" done (if done at all) by Dr. Craig was not successful, while the "jobbing" done by some one else was successful. But one other person had the opportunity and the motive, besides herself, and she says that she did not do so. Dr. Craig says that she told him that she had done so with a lead pencil. She was then in the presence and under the coercion of Lilly, but the doctor made no examination, and the evidence that no water passed tends to show that, if she made such a statement, the crime had not yet been accomplished. Three days afterwards, when Lilly brought Dr. Aultz, the crime had been perpetrated, although not fully consummated. He left them alone, and when, shortly afterwards, he returned, he found that the crime had been consumated, and the result and the evidence thereof had been removed and buried by Lilly. It matters not how produced,—Lilly was certainly the instigator, the promotor, and prime mover thereof. Whether he did the "jobbing" or not he was a principal in its procuration. This girl, as shown by her own testimony, was as completely under his control as though under lawful coverture. He, a married man, with a large family, had deserted them, and had seduced and was cohabiting with this girl, still in her minority, as though she were his wife. She, created as a divine fountain for the propagation of the human race, is induced by him to become a mere instrument for the satisfaction of his more than brutish lusts, and when nature asserts itself, in producing the result which is the only righteous justification for such intercourse, he proceeds to destroy it, as an unwelcome interference with his beastly prostitution both of himself and

his unfortunate victim. This prosecution is limited to the crime of abortion, but the lawless adultery leading up to and culminating in the crime adds to its heinousness. While adultery among the early Jews was punished with death, the crime of abortion was unknown. A woman's pride was in her offspring, and childlessness was her reproach. There is no crime more heinous against humanity or the Creator. As compared with it, second-degree murder is commendable; for while the one has but one victim, and destroys only the body, the other has two victims, and destroys both soul and body. Man's present laws visit the severest punishments on murder, out of common sympathy for the common frailties of human nature, and because of the inabilities of an imperfect creature to mete out perfect justice. This must be left to an Infinite Being, of infinite wisdom and justice. It would certainly seem, however, under the light of this evidence, and the certain guilt of the prisoner, that three years' confinement in the penitentiary is none too severe. The judgment is affirmed.

Affirmed.

CHARLESTON.

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ROBERTSON v. HARMON.

Submitted January 22, 1900.—Decided March 24, 1900.

1. APPEAL—*Evidence—Review.*

Where a motion is made in the circuit court to set aside a verdict on the ground that the same is contrary to the evidence, and the court fails to certify all the evidence offered, or all the facts proved, the court cannot review or reverse the judgment for that cause. (p. 502).

2. VERDICT--*Motion—Judgment—Presumption.*
Where a circuit court, on motion, sets aside the verdict of a jury as contrary to the law and the evidence, the presumption of law is in favor of the correctness of the judgment, and it is incumbent on the party assailing the action of the court on the ground that it is contrary to the evidence to show the error by producing all of the evidence before the court. (p. 502).

3. EVIDENCE—*Conflict—Judgment—Reversal.*
Though evidence be conflicting, the court may set aside the verdict if against the weight of evidence, but such power should be exercised cautiously. When the court does so, its action is regarded with peculiar respect in an appellate court, and will not be reversed unless plainly wrong. (p. 503).

Error to Circuit Court, McDowell County.

Action by Eugene Robertson against D. H. Harmon, Jr. Judgment for defendant, and plaintiff brings error.

Affirmed.

RUCKER, KELLER & HAMILL, for plaintiff in error.

W. L. TAYLOR and R. C. MCCLAUGHERTY, for defendant in error.

ENGLISH, JUDGE:

Eugene Robertson, the plaintiff in error in this case, was appointed a United States deputy marshal to serve under S. S. Vinson, United States marshal for the district of West Virginia. On the 30th of September, 1894, said Robertson filed his account for services rendered in the usual manner, which account, after deducting all disallowances and the percentage due the marshal, amounted to one thousand, two hundred and twenty-two dollars and thirty cents. Only one-half of this amount was sent by the marshal to said Robertson, and the residue thereof, at the instance of D. H. Harmon, Jr., also a deputy marshal, was placed to the credit of said Harmon and L. B. Vinson, another deputy marshal; said Harmon claiming the right to so credit said half on the ground that Robertson agreed to give him and L. B. Vinson one-half of his earnings as deputy if said Harmon would secure plaintiff the appointment as deputy marshal. The plaintiff made

frequent demands on said Harmon for the residue of said money. He promised to make it all right, but failed to do so, and on the 30th of April, 1896, Robertson filed in the clerk's office of the circuit court of McDowell County a notice under section 6 of chapter 121 of the Code for the recovery of six hundred and eleven dollars and fifteen cents, the one-half of the sum so credited, which had been collected and received on plaintiff's account from the office of the United States marshal, which notice had been served on Harmon, informing him that on Monday, the 8th of June,—that being the first day of the June term of the McDowell circuit court,—he would move said court for judgment for said sum, with interest thereon from September 30, 1894, and costs. The case was regularly docketed on June 8th, and on the 10th a motion was made to quash the notice, which was overruled. The defendant pleaded that he did not owe plaintiff said sum, and issue was joined thereon. On March 14, 1898, the case was submitted to a jury, and resulted in a verdict for the plaintiff for two hundred and fifty-five dollars and fifty-seven cents, and thereupon the defendant moved the court to set aside the verdict and grant him a new trial on the ground that the same is contrary to the law and the evidence, which motion was sustained by the court, and the verdict set aside. The plaintiff excepted, and took a bill of exceptions, and thereupon the plaintiff obtained this writ of error, assigning as the sole ground of error, the action of the court in setting aside the verdict of the jury.

The bill of exceptions does not certify all of the evidence, or all of the facts proved, so that this Court has no opportunity of determining whether the action of the court in setting aside the verdict was proper or not. This Court held, in *Ilsley* v. *Wilson*, 42 W. Va. 758 (26 S. E. 551), that, "where a motion is made in the circuit court to set aside a verdict on the ground that the same is contrary to the evidence, and the court fails to certify all the evidence offered or all the facts proved, this Court cannot review or reverse the judgment for that cause." See, also, *Shrewsbury* v. *Miller*, 10 W. Va. 116; *Bank of Valley* v. *Bank of Berkeley* 3 W. Va. 386. The court gave the instruction asked for

by the plaintiff, and refused that asked for by the defendant, so that the plaintiff, who is plaintiff in error here, cannot complain of the action of the court with reference to the instructions asked. Now, it is true the record shows that certain depositions were read to the jury, among them that of E. L. Nash, bookkeeper for Marshal Vinson, who states that on September 30, 1894, he credited D. H. Harmon, Jr., and L. B. Vinson with a portion of the fees due by said marshal's office to Eugene Robertson. This witness was also asked to make and file with his deposition a full statement of the accounts of Deputy Robertson from the time he was first appointed up to the close of his official connection with the office under Marshal Vinson, showing the time and amount of this credit mentioned, and file the same with his deposition, to be marked "E. L. Nash." He answered, "I will." He was asked also on cross-examination to file with his deposition the account of D. H. Harmon, Jr., as shown by his books, marked "D. H. H.", and answered, "I will." While these exhibits may have been before the circuit court, and would, no doubt, throw light upon the question presented to this Court, they are not certified as part of the evidence, and, not having the facts before us upon which the action of the circuit court was based, we are met with the presumption that the judgment of the circuit court was correct. In the case of *Grogan* v. *Railway Co.*, 39 W. Va. 415, (19 S. E. 563), this Court held that: "Though evidence was conflicting, the court may set aside the verdict if against the weight of evidence; but such power should be exercised cautiously. When the court does so, its action is regarded with peculiar respect in an appellate court, and will not be reversed unless plainly wrong." In the absence of evidence, we cannot say whether the action of the court was right or wrong, and the judgment must be affirmed.

Affirmed.

CHARLESTON.

CARTER v. GILL *et al.*

Submitted January 22, 1900—Decided March 24, 1900.

1. COMMISSIONER'S REPORT—*Facts—Fraud—Review.*
   A finding of facts by a commissioner, confirmed by the circuit court, is viewed by this Court with peculiar respect, and such finding will not be disturbed unless plainly erroneous. (p. 507).

2. WITNESS—*Transaction with Decedant.*
   No party to any action, suit, or proceeding, nor any person interested in the event thereof, nor any person from, through, or under whom any such party or interested person derives any interest or title by assignment or otherwise, shall be examined as a witness in regard to any personal transaction or communication between such witness and a person at the time of such examination deceased, against the administrator of such deceased person, unless such administrator be examined on his own behalf in regard to the same transaction or communication. (p. 507.)

Appeal from Circuit Court, Cabell County.

Bill by T. H. Carter against T. J. Gill and others. Decree for plaintiff, and J. G. Porter and others appeal.

Affirmed.

T. W. PEYTON, for appellants.

CAMPBELL, HOLT & CAMPBELL, and H. C. DUNCAN, JR., for appellee.

ENGLISH, JUDGE:

T. H. Carter, administrator of the estate of Henry A. Gill, deceased, filed his bill in equity in the circuit court of Cabell County at the April rules, 1897, against T. J. Gill and others, alleging that on the 2d of May, 1892, said Gill conveyed to C. W. Campbell, trustee, a certain tract of land situated on the waters of One Mile creek in Lincoln

County, West Virginia, containing two hundred acres, in trust to secure a certain promissory note of even date therewith executed by said T. J. Gill, and payable one day after date, to the order of J. G. Porter, for the sum of nine hundred and fifty dollars; that on July 5, 1892, for value received, said Porter assigned and delivered said note to H. A. Gill, since deceased, and it is now in the hands of his administrator (the plaintiff), due and unpaid, which trust was admitted to record in Lincoln County, on May 2, 1892, and, with said note, is exhibited. The plaintiff, in his bill, also sets forth other deeds of trust executed by T. J. Gill on various tracts of land owned by him in Cabell and Lincoln Counties to secure different parties various amounts owing them. The bill also sets forth judgments for different amounts recovered by various parties against said T. J. Gill, giving the amount of each, and the date the same was docketed, and then alleges that all of said judgments, as he is informed and believes, were paid, with the exception of those in favor of John F. Daniels, Adeline S. Porter, Wysong & Noell, Shem Childers, and Jelenko & Bro., and alleges that said deeds of trust and said unpaid judgments constitute liens upon the real estate of T. J. Gill, and by reason of the liens and incumbrances on the same land by which payment of the amounts due Henry A. Gill is secured he was unable to collect the amounts due him as adminstrator of Henry A. Gill's estate by sale under the deeds of trust securing same, and he prays that the defendants be required to prove their claims and establish their priorities; that the property of T. J. Gill therein described, and any other property he may have, may be sold by order of the court and distribution of the proceeds made accordingly. John G. Porter, Jacob G. Porter, and the latter as administrator of Jeruel Porter, deceased, filed their joint and separate answer to plaintiff's bill, admitting the execution of the deed of trust dated May 2, 1892, by T. J. Gill to C. W. Campbell, trustee, to secure said note for nine hundred and fifty dollars, executed by T. J. Gill, and payable one day after date to Jacob Porter and J. J. Porter, but allege that the assignment to H. A. Gill was made to him as their agent for the sole purpose of enabling him (Gill) to collect said note, and account to them for the proceeds

thereof. The defendants also set forth certain judgments that were rendered in favor of the Porters against T. J. Gill & Co. and J. F. Gill & Bro., the firm of T. J. Gill & Co. composed of T. G., Elisha, and H. A. Gill, then deceased; and allege that at the time said judgments were rendered, and for the purpose of protecting the interests of H. A. Gill and enabling him to collect the said indebtedness, and thus save himself harmless on the said judgments, they gave him said note for nine hundred and fifty dollars, which he was to collect by a sale of the land conveyed in said trust deed, and account to respondents, and they deny that plaintiff has any interest in said note, or that H. A. Gill, in his lifetime, had any interest therein; and they pray that the plaintiff may be required to reassign the same note to them; that the said land so conveyed to secure the payment of said note be subjected to the payment thereof, and, in case said land shall not sell for a sufficient sum to pay off said trust-deed lien, that then their several judgments may be enforced as to the balance remaining due thereon. The cause was referred to a commissioner to ascertain—First, what real estate T. J. Gill then owned, where situated, and its value; and secondly, what liens then existed upon the property of T. J. Gill, whether by judgment, deed of trust, or otherwise, in whose favor, and their priorities. The commissioner reported as first lien on the two hundred acres in Lincoln County certain taxes, and the said trust deed dated May 2, 1896, to secure the plaintiff, as administrator of H. A. Gill, said nine hundred and fifty dollars, which, with interest to March 8, 1898, amounted to one thousand two hundred and eighty dollars. This item of the account was excepted to by the Porters, which exception was overruled. The action of the court in overruling said exception is the only ground of error relied on by the appellant, who is then confronted with the finding of the commissioner, confirmed by the circuit court, as to the validity and priority of this trust lien for nine hundred and fifty dollars, with its accrued interest, on the two hundred acre tract in Lincoln County.

The decisions of this Court are numerous as to the effect of the confirmation of the finding of a commissioner on questions of fact. In *Cann* v. *Cann's Heirs*, 45 W. Va. 563,

(31 S. E. 923), it is held that: "A finding of facts by a commissioner, confirmed by the circuit court, is viewed with peculiar respect by this Court, and such finding will not be disturbed unless plainly erroneous." Also, in *Hartman* v. *Evans*, 38 W. V. 670, (18 S. E. 810), it was held that: "Every presumption is made in favor of the correctness of the decision of the commissioner in chancery. If the testimony is conflicting, the court rarely interferes with his finding on the facts, provided he makes no error of law affecting the result." See, also, *Fry* v. *Feamster*, 36 W. Va. 454, (15 S. E. 253); *Reger* v. *O'Neal*, 33 W. Va. 159, (10 S. E. 375), 6 L. R. A. 427; and many others. The commissioner's report is excepted to by J. G. and J. J. Porter, so far as the same finds that the note of nine hundred and fifty dollars executed to T. J. Gill, and payable to J. G. and J. J. Porter, secured by trust deed, was not assigned to H. A. Gill, to be by him collected, and the proceeds paid to the payees of said note, as claimed in exceptors' answer. Now, in order to support the contention of defendants, J. G. Porter, a party to the suit in his own right and as administrator, was asked to state, what he knew about the assignment of said nine hundred and fifty dollar note to H. A. Gill. Among other things, he was asked. "Was anything paid you by H. A. Gill for this assignment, or was there any other valuable consideration for the same?" He answered, "No, sir." When attention is called to the fact that this defendant, in his answer to plaintiff's bill, prays that the plaintiff may be required to reassign the said note to him and his brother; that the land conveyed to secure the payment of said note be subjected to the payment thereof, and, in case the land shall not sell for a sufficient sum to pay off said trust-deed lien, that their several judgments may be enforced as to the balance against firms in which H. Gill was a partner, it is perceived that this party defendant is testifying in his own behalf as to transactions had with a deceased person in regard to matters in which he is directly interested, and his testimony was properly disregarded. T. J. Gill, the maker of the note, was also introduced by defendants, and asked to state what he knew about the assignment of said note, and commenced his testimony by saying that the biggest part of the claim for

which this note was given was his individually. He said: "The Porter heirs, Jake and John, and perhaps Adeline, were interested. The Porter heirs concluded they would rather have my brother go into different judgments, and my brother consented to do so, provided they would indorse this note to him to secure him against these judgments." Now, this witness at once shows his interest. He is a party defendant, and testifying in his own behalf as to transactions had with his brother then deceased: and in answer to question eight he testifies as to conversations with his brother, H. A. Gill, as to what disposition he was to make of the proceeds of said note, which was clearly incompetent. It appears that on July 5, 1892, the same day said note for nine hundred and fifty dollars was assigned to H. Gill, which, of course, carried with it the deed of trust by which it was secured, J. J. Porter, assignee of J. G. Porter, administrator, and Adeline S. Porter, assignee of J. G. Porter, administrator, obtained judgments against firms in which H. Gill was a partner for the individual indebtedness of T. J. Gill. This fact tends strongly to show that said note and deed of trust were assigned to H. A. Gill to indemnify him against said judgments. The defendants, however, deny that said H. A. Gill in his lifetime had any interest in said nine hunderd and fifty dollar note, save as agent of defendants to collect same, and they ask that the plaintiff be required to reassign the note to them, that the land described in the trust be subjected to the payment thereof, and, in the event said land does not sell for enough to pay said trust lien, that said several judgments be enforced. In my view of the case, the circuit court committed no error in overruling the exception of the Porters to the commissioner's report, and confirming the same, so far as it found that the note for nine hundred and fifty dollars, executed by T. J. Gill, and payable to J. G. Porter and J. J. Porter, and secured by trust deed on said two hundred acre tract, was not assigned to H. A. Gill to be by him collected, and the proceeds paid to the payees of said note, as claimed in their answer, and in directing a sale of said lands in the bill and proceedings mentioned. The decree is affirmed.

Affirmed.

CHARLESTON.

SNODGRASS v. SOUTH PENN OIL CO.

Submitted January 27, 1900—Decided March 24, 1900.

OIL LEASES—*Construction.*

Where a party leases a tract of land for the purpose of mining and operating for oil and gas, the lessee contracting to deliver to the credit of the lessor one-eighth of the oil produced, and saved from the premises, and to pay two hundred dollars per year for the gas from each well drilled, and the lease also contains the following provision: "Provided, however, that this lease shall become null and void, and all rights thereunder shall cease and determine, unless a well shall be completed on the premises within one year from the date hereof, or unless the lessee shall pay at the rate of three hundred and fifty dollars quarterly in advance for each additional three months such completion is delayed from the time above mentioned for the completion of such well until a well is completed. *Held*, that this provision did not bind the lessee to pay any rent for the land, or for delay in commencing to operate for oil and gas, and, in the absence of some other clause binding the lessee to pay for such rent or delay, an action of *assumpsit* could not be maintained on such lease for failing to pay such rent, or for such delay. (p. 572.)

Error to Circuit Court, Braxton County.

Action by C. N. Snodgrass against the South Penn Oil Company. Judgment for defendant, and plaintiff brings error.

Affirmed.

JOHN B. MORRISON, for plaintiff in error.

A. B. FLEMING and U. N. ARNETT, Jr., for defendant in error.

ENGLISH, JUDGE:

C. N. Snodgrass and wife entered into an agreement with the South Penn Oil Company whereby they leased to said company, for the purpose of operating for gas and oil,

mining, laying pipe lines, building tanks, etc., a certain tract of land situated partly in Gilmer and partly in Braxton Counties, of three thousand five hundred acres, more or less, with certain reservations. This tract was described in said agreement, which contained the following clause: "Provided, however, that this lease shall become null and void, and all rights thereunder shall cease and determine, unless a well shall be completed on the premises within one year from the date hereof (July 18, 1896), or unless the lessee shall pay at the rate of three hundred and fifty dollars quarterly in advance for each additional three months such completion is delayed from the time above mentioned for the completion of such well, until a well is completed." No well having been commenced or completed on said tract of land on the 1st of September, 1898, said Snodgrass brought an action of trespass on the case in *asssumpsit* upon said agreement or lease, setting forth the terms or conditions of the lease, and, among other things, that by the writing aforesaid the defendant agreed and promised the plaintiff to complete a well on said premises within one year from the date thereof, and, in case of failure to so complete such well within one year, to pay to plaintiff a rental of three hundred and fifty dollars quarterly in advance, to wit, three hundred and fifty dollars for each three months, and to continue to do so until such well should be completed, etc., and that by the terms of said contract there was due from said defendant to the plaintiff on account of said sums to be so paid quarterly in advance the sum of one thousand four hundred dollars, and claiming damage to the amount of one thousand nine hundred and fifty dollars. On November 28, 1898, the defendant craved oyer of the writing obligatory in the declaration mentioned, and filed a general demurrer to the plaintiff's declaration, in which demurrer the plaintiff joined. Subsequently, the plaintiff was permitted to amend his declaration by writing the following words therein: "And did not surrender or offer to surrender the said lease to the plaintiff for cancellation, but still holds and retains the same." The court, having fully considered the demurrer of the defendant to the declaration of the plaintiff, sustained the same, and dismissed the plaintiff's action with

costs, and from this judgment the plaintiff obtained this writ of error.

It is claimed that the court erred in sustaining said demurrer and dismissing said action. By craving oyer of the obligation sued on, the same was made a part of the declaration ,and the question raised and presented for consideration by the demurrer is whether the agreement upon which this action is predicated contains any contract or promise, either express or implied, for the payment of money by the defendant to the plaintiff. Although the agreement contains the provision above quoted, yet that clause merely provides a means by which a forfeiture of the lease may be avoided. The agreement contains no contract or promise to pay anything whatever for the delay in the completion of a well, and yet the declaration claims that, by the terms of the contract, there is due from the defendant to the plaintiff on account of the sums to be paid quarterly in advance the sum of one thousand four hundred dollars. The question in this case is not whether the defendant has forfeited the lease, but whether it is pecuniarily liable to the plaintiff for failing to make certain payments to the plaintiff whereby such forfeiture could have been avoided. Counsel for the plaintiff relies on the case of *Roberts* v. *Bettman*, 45 W. Va. 143, (30 S. E. 95), but that case was materially different from this. There the leases sued on contained the following clause: "It is agreed that the party of the second part shall pay to the party of the first part one hundred dollars per month, in advance, until a well is completed, from the date of this lease, and a failure to complete such well or to pay said rental when due or within ten days thereafter shall render this lease null and void," etc. There was an express promise to pay one hundred dollars per month in advance until a well was completed, but in the agreement sued on in the case under consideration there was no such promise or contract. Counsel for plaintiff in error claims that the lease continued unless it had been surrendered by the defendant, but, even if that be true, it would work no benefit to the plaintiff in error, for the reason that there was no contract on the defendant's part to pay anything as rent or compensation for delay in commencing operations. In

the case of *Glasgow* v. *Gas Co.*, 152 Pa. St. 48, 25 Atl. 232 —an action of *assumpsit* to recover rent or royalties on an oil lease,—the lease sued on contained this proviso: "Provided, however, that this lease shall become null and void, and all rights hereunder shall cease and determine, unless a well shall be completed on the premises within one month from the date hereof, or unless the lessee shall pay at the rate of one hundred dollars monthly in advance for each additional month." It was held that the lease contained no covenant on the part of the lessee to pay rent or develop the land. The only penalty imposed on him for failure to operate the land or pay one hundred dollars per month for delay was a forfeiture of his rights under the agreement. The agreement in that case appears to have been almost identical with that in the case we are considering. The construction placed upon said clause in the agreement, and the conclusion reached by the Pennsylvania court as to the consequences resulting from a failure to pay the one hundred dollars monthly in advance, seem to be reasonable and right, and they accord with my views on the proper construction of the agreement declared on in the case at bar. In the absence of any contract or promise on the part of the defendant to pay rent for failure to commence operations, I conclude that, under this agreement, the only consequence that would result from such failure would be a forfeiture of the lease, and that the court committed no error in sustaining the demurrer to the plaintiff's declaration.

Affirmed.

CHARLESTON.

DUNLEVY v. COUNTY COURT OF MARSHALL CO. *et al.*

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Submitted February 10, 1900—Decided March 24, 1900.

1. ELECTION-LAW—*Canvassers—Ballots—Intention.*

Under the present election law of this State, the duties of the board of canvassers in recounting the ballots are purely ministerial, and not judicial, and it is its legal duty to count all ballots or parts of ballots where the intention of the voter appears from the face of the ballots, though not marked or erased in the plain manner directed in the statute, and to reject all ballots or parts of ballots where such intention does not appear from the face of the ballots. If, from the face of his ballot, the intention of the voter is apparent as to his choice of candidates for any office, his vote should be counted as to such office, although his intention as to other candidates for other offices be nonascertainable, and the ballot invalid as to them. (pp. 514-515.)

2. CANVASSING-BOARD—*Record—Ministerial.*

It is the ministerial duty of the board of canvassers to make a careful record of every ballot rejected by it, with the reasons therefor, and the identification of such ballot as a part of such record. (p. 518.)

3. ELECTION-OFFICERS—*Mandamus.*

While *mandamus* is the proper legal and efficacious remedy provided by statute for the purpose of compelling the election officers to discharge their duties in conformity with the law, when such officers, in violation of their ministerial duties, assume the exercise of judicial functions, *certiorari* may be resorted to for the purpose of reviewing their erroneous rulings, although *mandamus* would furnish more speedy, less expensive, and more adequate relief. (p. 520).

Error to Circuit Court, Marshall County.

Action by J. W. Dunlevy against the county court of Marshall County and S. R. Davis. Judgment for plaintiff, and defendants bring error.

Affirmed.

J. B. MCCLURE, for plaintiffs in error.

J. ALEX. EWING, J. C. SIMPSON and C. C. NEWMAN, for defendant in error.

DENT, JUDGE:

At the November election, 1898, J. W. Dunlevy and S. R. Davis were opposing candidates for the office of county commissioner of the county of Marshall. The precinct returns showed that Dunlevy received two thousand and sixty-six votes and Davis one thousand nine hundred and twenty-five votes, thus electing Dunlevy by a majority over Davis of one hundred and forty-one votes. Davis demanded of the board of canvassers a recount, which they proceeded to make, and, by rejecting numerous votes, they reduced Dunlevy's vote to one thousand eight hundred and one, and Davis' vote to one thousand eight hundred and four, thus giving Davis a majority of three. The canvassers failed to make a record of each vote rejected as required by statute, and refused to sign bills of exceptions to their rulings, until compelled to do so by *mandamus*. Dunlevy then applied to the circuit court for a *certiorari*, which was awarded and the court, on a hearing thereof, found that the board of canvassers had illegally refused to count a large number of ballots cast for Dunlevy, more than sufficient to change the result of the election, reversed the finding of the board, and remanded the case to them, with directions to reconvene, and include in their count the illegally rejected ballots, and declare the result of the election accordingly. From this order the board and S. R. Davis obtained from a judge of this Court a writ of error. The original ballots, which were before and acted upon by the circuit court, the plaintiffs in error have not seen fit to bring here, but they produce along with the record copies of the faces of such ballots for the inspection of this Court. The ballots are the primary record evidence of every election from which the precinct's returns are made up, and by which such returns must be sustained or disproved. And when, on a recount, any of such ballots are rejected, it is the duty of the board of canvassers to make a record thereof, showing the reasons for such rejection, and clearly identifying such rejected ballots for future le-

gal investigation; and the same rule applies to doubtful or objectionable ballots included in the recount by the board. If the record is properly made up, no bills of exceptions are necessary to make such ballots a part thereof, nor does the law contemplate such necessity, but the ballots, by the mere identification therein, become a part thereof from the fact that they are already the record evidence of the election. Section 34, chapter 3, Code, as amended in chapter 25, Acts 1893, relates to the proper preparation of ballots, and the manner in which they shall be marked to indicate the intention of the voter as to the various candidates to be voted for; being in this latter respect merely directory. It provides, among other things, that "all candidates or persons voted for by any voter shall be those whose names are printed or written as aforesaid thereon; and every other ballot on the same sheet shall be defaced by drawing one or more lines with pen and ink or indelible pencil from the top to the bottom thereof, or across the heading thereof or in any other way indicating that the same has not been voted by the voter. But if more than one of said ballots have nothing on them to indicate which of them was not so voted, then neither of them shall be counted." And in section 66, same chapter, it is provided that "any ballot or part of a ballot from which it is impossible to determine the elector's choice of candidates shall not be counted as to the candidate or candidates affected thereby." These provisions, construed together, show that it was the purpose of the legislature that the ballots were not to be received or rejected as a whole, but as to each office they were to be regarded and acted upon separately, so that, if the intention of the voter was apparent as to any of the candidates for any of the various offices voted for, his vote was to be counted for such office or candidate, although his intention as to all the other offices and candidates might be nonascertainable from the markings of his ballot; and his ballot as a whole was to be rejected only when there was nothing thereon to indicate the voter's choice as to any of the candidates. Each office is thereby made separate and independent of all the others, and the intention of the voter as to one is no indication of his intention as to the others, but each must stand or fall on its own

merits. It is, therefore, the legal duty of the board of canvassers, on recounting the ballots, to give effect to the separate intention of the voter as to each of the offices for which there are candidates, and count the vote in so far as it is valid, and reject it only in so far as it is invalid. The law seeks to secure to every elector the right to vote, and the board of canvassers can neither disfranchise him nor vote for him. If he loses his vote, it must be from his failure to indicate by his ballot his intentions as to any office. If he makes his intention appear, his vote must be counted. The board has neither the discretion to reject a legal nor to cast an illegal vote. They are bound by the ballots, and, as they indicate, the votes must be counted as to each office separately. There were fifty-three bills of exceptions taken to the rulings of the board of canvassers, which might have been dispensed with had the board performed its duties, and kept its record legally. It is unnecessary to review them all, as it is plainly apparent that the board, without regard to the law, illegally changed the result of the election. The board, in rejecting numerous ballots, gave no heed to the intention of the voter as to the particular office about which the recount was being had, but seized on most any technical objection for the purpose of rejecting a ballot, as follows, to wit, a number of ballots were rejected because the intention of the voter as to choice for congress was not indicated, although he plainly indicated his intention as to county commissioner. A number of others were rejected for the reason that the voter had failed to scratch off any of the party headings, although he plainly indicated his intention as to county commissioner. A number of others were rejected because the voter scratched out the name of S. R. Davis, and inserted in the same space the name of J. W. Dunlevy, instead of writing the latter's name in the blank space provided. A number of others were rejected for the reason that the voter indicated by a cross above the Democratic, Prohibition, and People's Party tickets that he intended to vote the Republican ticket, and then scratched out the name of S. R. Davis on the Republican ticket and inserted in lieu thereof the name of J. W. Dunlevy. A number of others were rejected for the reason that the voter, by a cross above the Prohibi-

tion, People's Party, and Republican tickets indicated his intention to vote the Democratic ticket. The circuit court, on an inspection of the ballots, found errors in the recount against J. W. Dunlevy to the number of two hundred and thirty-nine votes, and against S. R. Davis to the number of one hundred and twenty-four votes, making an actual majority in favor of the former of one hundred and twelve votes. These original ballots are not before us, nor do the plaintiffs in error point out specifically any errors committed by the circuit court in the examination of such ballots. The assignments of error are of such a general nature as to afford the Court no light. Nor is the brief of counsel much more specific. The petition for *certiorari*, certainly shows that the petitioner was elected on the face of the returns, and that on the recount enough legal votes were rejected by the board to change the result against him. This was certainly error by which he was prejudiced, and of which he had a right to complain. The ballots, when properly identified, are the record evidence of the election, and could be removed by *certiorari* into the circuit court for inspection. They are not before this Court for the reason that no error is specified as to them, and this Court is not called upon to examine them. If there was error with regard to them, it was the duty of the plaintiffs in error to point out the same, and bring them up for inspection. Error must affirmatively be made to appear in this Court. For the first time the objection is made that the ballots are not properly indorsed by the poll clerks. This simply refers to the copies produced in this Court. No such question was raised in the circuit court, and therefore we must presume that the original ballots were properly indorsed; and, if the plaintiffs in error placed reliance on such objection, they should have produced the original ballots here to show that such objection is tenable, and not raised it for the first time for the purpose of taking advantage of a mere clerical oversight in no wise affecting the case as it was presented to the circuit court. It is further objected that the circuit court, instead of responding to the various bills of exceptions, took up the rejected ballots as certified by the board of canvassers, and indicated which of them should be counted and which

should be rejected. This is a sufficient answer to the various bills of exceptions, as it determines specifically and definitely the matter in issue between the parties, and left nothing for the board of canvassers to do but to sum up and declare the true result of the election, instead of substituting its will for that of the people. Nor does it make any difference that S. R. Davis proceeded to qualify at once as commissioner. The declaration of the result of the election being erroneous and illegal, and being reversed and annulled by the circuit court, his qualification fell therewith, and his apparent right to the office was vacated thereby. A board of canvassers cannot make law, but they must obey it as it is made for them. *Alderson* v. *Commissioners*, 32 W. Va. 454, (9 S. E. 863).

Is *certiorari* a proper remedy? It is certainly inadequate. It being a mere appellate process, subject to the law's delays, the term of office may expire before relief can be afforded. In this case almost two years has elapsed, and the end is not yet. Under the statute, the counting of ballots is purely a ministerial act. The face of the ballot must show the recorded intention of the voter as to any office. If this appears, it must be counted as to such office. If it does not, it must be rejected. The facts being set at rest by the ballot, the law allows the board of canvassers no discretion. They must obey the behests of the law, and *mandamus*, both at common law and now by virtue of the statute, is the only adequate remedy to compel the board to discharge its legal duties in this respect. Section 89, chapter 25, Acts 1893; *Hebb* v. *Cayton*, 45 W. Va. 578, (32 S. E. 187); *Marcum* v. *Commissioners*, 42 W. Va. 263, (26 S. E. 281), 36 L. R. A. 296; High, Extr. Rem. § 56. When the board assumes to exercise a legal discretion which it does not possess, its action may be controlled by prohibition. *Brown* v. *Board*, 45 W. Va. 826, (32 S. E. 168). And in such cases, at common law, *certiorari* would lie as an appellate process, not because the board is a *quasi* judicial tribunal, but because, being a ministerial body, it undertakes to exercise judicial functions. The common law supplies the milder process of *certiorari*, when adequate, in place of the harsher remedies of *mandamus* and prohibition. If it did not lie at common law, *certiorari*

could not be resorted to under section 2, chapter 110, Code, for the reason that the election statute furnishes an ample remedy by *mandamus* to review and control the illegal actions of the election officers. *Chenowith* v. *Commissioners*, 26 W. Va. 230; *Alderson* v. *Commissioners*, 31 W. Va. 633, (8 S. E. 274). Prior to the enaction of the present election law, it had been establish by the decisions of this Court—*Brazie* v. *Commissioners*, 25 W. Va. 213; *Chenowith* v. *Commissioners*, *supra*; *Fleming* v. *Commissioners*, 31 W. Va. 609, (8 S. E. 267); and *Alderson* v. *Commissioners*, 31 W. Va. 633, (8 S. E. 274)—that election officers had conferred upon them both ministerial and judicial powers, and that *certiorari* and not *mandamus*, was the proper remedy to review their proceedings. In other states election officers are regarded as mere ministerial officers, and they are controlled in the discharge of their duties by the writ of *mandamus*. *People* v. *Hilliard*, 29 Ill. 413; *People* v. *Rives*, 27 Ill. 246. When the legislature re-enacted the election law of this State in 1891, it undoubtedly intended to take away all judicial functions from the election officers, and by careful provision make all their duties purely ministerial, subject to the control of the writ of *mandamus*. Section 89, chapter 3, Code. This purpose was rendered more apparent by amendment in 1893, when the duties of the election officers were more carefully defined, and it was provided that "a *mandamus* shall lie from the supreme court of appeals, or any one of the judges thereof in vacation, returnable before said court, to compel any officer herein to do and perform legally any duty herein required of him." In short, the court is to construe the law, and compel such officers to discharge their duties in accordance therewith. Such officers are allowed no judicial discretion. They must ascertain the facts, and discharge their duties strictly in conformity with the law, and a departure therefrom in any particular subjects them to the writ of *mandamus*. The writ of *certiorari* is thereby rendered wholly unnecessary, as a far better and more effective remedy is afforded by *mandamus*. Nevertheless, it is not entirely taken away, but the same rule would apply to its use in summary proceedings as applies to a writ of error in proceedings of record. *Railroad Co.*

v. *Paull*, 39 W. Va. 142, (19 S. E. 551); *Dryden* v. *Swinburn*, 20 W. Va. 89; *Id.*, 15 W. Va. 234; *Swinburn* v. *Smith*, 15 W. Va. 483. This is that the remedies of *mandamus* and *certiorari* would be concurrent with the right to the litigant to make choice between them. A right choice in all election controversies arising under the election law would render the writ of *certiorari* obsolete in such cases, for the reason that *certiorari* is subject to all the law's delays, and is inadequate, and highly expensive, compared with the more direct and efficacious remedy afforded by *mandamus*. The judgment of the circuit court is affirmed.

Affirmed.

CHARLESTON.

BLAKE *v.* OHIO RIVER RAILROAD CO.

Submitted January 17, 1900 - Decided March 24, 1900.

1. JUDGMENT—*Evidence—Estoppel.*

   A judgment is conclusive by way of estoppel as to facts without the existence and proof or admisssion of which the judgment could not have been rendered. (p. 527).

2. QUESTIONS—*Assumed—Res Judicata.*

   A proposition assumed or decided by the court to be true, and which must be so assumed or decided in order to establish another proposition which expresses the conclusion of the court, is as effectually passed upon and settled in that court as the very matter directly decided. (p. 526).

3. COMPENSATION—*Verdict—Judgment—Estoppel.*

   The O. R. R. Co. instituted proceedings under section 14, chapter 52, Code, for condemnation of gravel, stone, etc., the property of B. Commissioners reported nine hundred and fifty dollars as just compensation, etc. Applicant paid same to the clerk of the court in vacation. B. excepted to the report on ground of inadequacy of compensation, and demand-

ed a jury, which was impanneled, and rendered a verdict for two thousand, five hundred dollars. Judgment was rendered in favor of B. for "the sum of one thousand, five hundred and fifty dollars, being the amount of two thousand, five hundred dollars aforesaid, less the nine hundred and fifty dollars heretofore paid into court by said railroad company," etc., to which judgment the O. R. R. Co. obtained a writ of error to the supreme court, and the judgment was affirmed. The clerk, without paying over the nine hundred and fifty dollars, died insolvent. B. brought her action of *assumpsit* against the O. R. R. Co. for the nine hundred and fifty dollars. *Held*, that B.'s judgment was *res adjudicata* as to the fact of the payment of the nine hundred and fifty dollars into court, and B. is estopped from prosecuting a claim for the same against the O. R. R. Co. (p. 525).

Error to Circuit Court, Cabell County.

Action by Cappie B. Blake against the Ohio River Railroad Company. Judgment for plaintiff, and defendant brings error.

Reversed.

VINSON & THOMPSON, for plaintiff in error.

CAMPBELL, HOLT & CAMPBELL, for defendant in error.

MCWHORTER, PRESIDENT:

On the 8th day of July, 1892, the Ohio River Railroad Company, under the provisions of chapter 52, Code, after notice to the owner, Cappie B. Blake, made application to Justice T. W. Taylor, of Cabell County, to appoint commissioners to ascertain what would be a just compensation to be paid said Blake for certain gravel and dirt proposed by it to be taken for use in the construction and maintenance of its road, etc. Commissioners were appointed, and qualified, and reported Blake's damages or compensation at nine hundred and fifty dollars, which report was filed in the clerk's office of the circuit court of said county. Blake excepted to the report for inadequacy of compensation, and demanded a trial by jury to ascertain the compensation. Applicant paid the said sum of nine hundred and fifty dollars to the clerk of the said circuit court in vacation, and took possession of the property and removed the gravel. The matter was tried before a jury in said court, and the jury returned a verdict for Blake for two

thousand nine hundred and thirty-three dollars damages. Applicant moved to set aside the verdict as excessive, and the court put the owner to an election to remit four hundred and thirty-three dollars of the verdict, or to have the verdict set aside and a new trial awarded. She elected to accept two thousand five hundred dollars in lieu of the verdict, and the court overruled the motion to set aside the verdict and grant a new trial, and rendered judgment as follows: "It is therefore considered by the court that the said Ohio River Railroad Company do pay to the said Cappie B. Blake the sum of one thousand five hundred and fifty dollars, being the amount of two thousand five hundred dollars aforesaid, less the nine hundred and fifty dollars heretofore paid into court by said railroad company, with interest thereon till paid, and the costs of this proceeding, both before the justice and in this court. It is further considered by the court that, till the one thousand five hundred and fifty dollars aforesaid shall have been paid, the said railroad company shall have no right or authority to enter upon said premises described in the proceeding, or to remove therefrom any earth or gravel. It is further considered that, when the said sum shall have been paid, the said company may enter upon said premises so described, and remove the earth and gravel therefrom, to the extent fixed in the verdict, and no more. It is further ordered that the clerk of this court pay to said Blake the said nine hundred and fifty dollars heretofore paid into his hands by the applicant, less the one hundred dollars paid by her consent to her tenant." Applicant paid the one thousand five hundred and fifty dollars. The clerk failed to pay over the money, or any part of it, and died insolvent. The State, at the relation of Blake, brought an action of debt on the clerk's official bond to recover the same against his sureties thereon. The court held (and was affirmed by this Court) that "the payment of money to the clerk in vacation is not equivalent to the payment of money into court, and, if the clerk fails to return such money into court, the sureties on his official bond cannot be held responsible for its loss." *State* v. *Enslow*, 41 W. Va. 744, (24 S. E. 679). Blake then brought her action of *assumpsit* against the applicant, the Ohio River Railroad

Company, for the said sum of nine hundred and fifty dollars, in the circuit court of Cabell County. Defendant pleaded the general issue, and, by permission of the court, filed six special pleas in writing, over the plaintiff's objection; plaintiff joining issue on each of said pleas. The matters of law and fact arising in the case were submitted to the court, in lieu of a jury, and upon a full trial the court found the issues for the plaintiff, and assessed her damages at one thousand and fifty-four dollars, and rendered judgment thereon. Defendant moved the court to set aside its finding and grant it a new trial, which motion the court overruled; and the defendant excepted, and filed its bill of exceptions, and obtained a writ of error, assigning as error that, if Blake had a right of action at all against appellant for the money sought to be recovered, it was not *assumpsit*, and the court should have sustained the demurrer of defendant to plaintiff's declaration. There was no demurrer interposed, as shown by the record, and the court passed upon none. The pleas entered by defendant were the general issue and the six special pleas mentioned. The amount of damages had been ascertained as provided by law, and the larger portion of it, if not all, had been paid, and appellant had taken possession of the property sought to be condemned, although technically wrongfully, if the damages were not all paid, as it had no right, under the statute, to take possession until the whole of the damages ascertained were paid; yet, the amount being ascertained and certain, plaintiff's proper action, if any she had, was *assumpsit* for the unpaid portion of the damages so ascertained.

The second assignment is that "the recital in the judgment in the condemnation proceedings which was introduced by the defendant in support of its plea is conclusive upon plaintiff, Blake, and she is estopped to deny that the nine hundred and fifty dollars recited in said judgment as having been paid into court was so paid in;" and the third assignment is that "the finding of the court, and the judgment entered thereon, are contrary to the law and the evidence, in this: That the whole testimony shows that the money paid by the railroad company into the hands of B. C. Wilson was so paid with the assent of the said Blake,

and said Wilson was a stakeholder mutually agreed upon by the parties." It is not denied that upon the filing of the award of the commissioners appointed by the justice, in the clerk's office of the circuit court, the applicant paid the nine hunderd and fifty dollars into the hands of B. C. Wilson, who was clerk of the said court; and it is insisted by appellant that the following reference in the judgment of the court, entered January 10, 1893, to the payment of the said sum, to wit: "It is therefore considered by the court that the said Ohio River Railroad Company do pay to the said Cappie B. Blake, the sum of one thousand five hundred and fifty dollars, being the amount of two thousand five hundred dollars aforesaid, less the nine hundred and fifty dollars heretofore paid into court by said railroad company," etc.,—is conclusive upon Blake, and that she is estopped to deny that it was paid into court. The payment to Wilson was without authority of law, and, of course, must be at its own risk, unless it is shown that plaintiff also made said Wilson her agent to receive the money, or to hold it for her after it came into his hands. Z. T. Vinson testified in the case at bar that he was one of the attorneys of the applicant in the condemnation proceedings; that, when the commissioners made their award of nine hundred and fifty dollars, their report was returned to and filed in the clerk's office, "and thereupon, as attorney for said road, I paid the amount of said award to said circuit clerk in vacation, and without any order of court at that time directing me to do so. Said court then had general receiver, but afterwards, by acquiescence and general understanding, that payment was treated as a payment into court, both by the parties as well as by the court, but there was no agreement to that effect. The railroad company was anxious to begin moving the gravel, and did not wait for the court to convene, but paid the award of the commissioners to the clerk of the court in vacation, and no objection or exception was made by Blake at any time to this payment." L. E. Blake also testified that he was husband of plaintiff, and acted as her agent, since before the institution of the original condemnation proceeding in this matter, that "at the time or shortly after the commissioners, Jack Johnson and Driggs, made their report in said

condemnation proceeding, the railroad company paid the award made by said commissioners to B. C. Wilson, clerk of the circuit court of Cabell County; but the clerk failed to pay the same either to Cappie B. Blake, or to me as her agent, or to any one else for her. This payment to the clerk was made in the absence of any agreement with Cappie B. Blake, or with me as her agent; and the railroad company has never paid the said sum of nine hundred and fifty dollars to her or to me for her. One hundred dollars thereof, however, was disbursed by said clerk to E. M. Ingalls, leaving a balance due Cappie B. Blake of eight hundred and fifty dollars. The railroad company has taken and carried away all of the gravel described in the verdict of the jury, and has paid the assessed value thereof, except the eight hundred and fifty dollars aforesaid." The proceeding for condemnation began in June, 1892. The commissioners filed their report in July. The sum of nine hundred and fifty dollars awarded by the commissioners was paid to the clerk by the applicant, who at once took possession, and commenced removal of the gravel. Blake excepted to the report on the ground of inadequacy of compensation, and demanded a jury to ascertain her damages. On the 1st day of September, 1892, E. M. Ingalls, the tenant of Blake, filed his petition in the cause for pay for damages to his crops; and he was allowed out of the fund so paid to the clerk one hundred dollars, which was paid to him, as stated by witness L. E. Blake. On the 7th day of December, 1892, a jury was impaneled, and on the 9th of December rendered their verdict; and on the 10th day of January, 1893, the court rendered its judgment on the verdict for one thousand five hundred and fifty dollars in favor of Cappie B. Blake, owner of the property condemned,—being the amount of two thousand five hundred dollars, the amount of the verdict, after the remitting of four hundred and thirty-three dollars granted by the owner, less the sum of nine hundred and fifty dollars, which the court found had been paid theretofore into court by the said railroad company. This was a judgment rendered for Blake in the proceeding, and to which she made no objection and took no exception. She knew the money was in the hands of the clerk. She makes no explanation

whatever of her conduct in allowing the money to remain with the clerk, when she could probably have had it for the asking. As stated by JUDGE DENT in *State* v. *Enslow*, 41 W. Va. 744, (24 S. E. 679): "Every one is presumed to know the law. Hence it must be presumed that the company, in depositing the money in the clerk's hands, and Mrs. Blake, in allowing the money to remain in his hands for so long a time without objection, when she might have had it herself, were fully informed as to the law, and that this conduct was controlled by their personal trust and confidence in the personal integrity of the clerk, and not from reliance on his official bondsmen." To this judgment for two thousand five hundred dollars, less the "nine hundred and fifty dollars paid into court," the railroad company obtained a writ of error. If Blake was not satisfied with the finding that the nine hundred and fifty dollars had been paid into court, why did she not file a cross assignment of error, and have the judgment corrected? The judgment was affirmed February 3, 1894. See 38 W. Va. 718, (18 S. E. 957). She raised no objection to the judgment when it was rendered, and acquiesced in it, certainly, until it was affirmed by the appellate court. She failed to ask on the 10th of January, 1893, for judgment for the two thousand five hundred dollars, instead of one thousand five hundred and fifty dollars, which she was entitled to have, and which she must have asked for, unless she was satisfied with the payment of the nine hundred and fifty dollars into the hands of the clerk of the court. The court ascertained in rendering its judgment that the nine hundred and fifty dollars had been by the applicant paid into court, and, without so ascertaining, it must have rendered judgment for two thousand five hundred dollars instead of one thousand five hundred and fifty dollars. In *Trustees* v. *Stocker*, 42 N. J. Law, 115, it is held that "a proposition assumed or decided by the court to be true, and which must be so assumed or decided in order to establish another proposition, which expresses the conclusion of the court, is as effectually passed upon and settled in that court as the very matter directly decided." See, also, *Tuska* v. *O'Brien*, 68 N. Y. 446. And in *Burlen* v. *Shannon*, 99 Mass. 200, it is held that "a verdict and judg-

ment are conclusive by way of estoppel only as to facts without the existence and proof or admission of which they could not have been rendered." *Fuller* v. *Eastman*, 81 Me. 284, 17 Atl. 67; *Kelley* v. *Donlin*, 70 Ill. 378; *Hemenway* v. *Wood*, 53 Iowa, 21, 3 N. W. 794. If the nine hundred and fifty dollars was paid into court by the applicant, the appellee had no cause of action against appellant. If it was not intended to be considered and treated as a payment into court, plaintiff should have insisted on judgment for the two thousand five hundred dollars, and not acquiesced in the payment and treated it as legal; but, accepting the judgment adjudicating the fact that the money was paid into court, she is estopped from denying such payment. For the reasons stated, the judgment of the circuit court will be reversed, and the action dismissed.

Reversed.

CHARLESTON.

SCHMERTZ *et al. v.* HAMMOND *et al.*

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Submitted January 20, 1899—Decided March 24, 1900.

1. WITNESS—*Evidence—Writing.*

Where it appears that a witness testifying in a case has a written agreement with a party in whose behalf he is giving testimony, touching the subject-matter in controversy, the witness should be required to produce such writing, and, on his refusal to do so, his testimony should be excluded. (p. 543).

2. CONVEYANCE—*Trust Deed—Equitable-Lien.*

V., by deed dated November 22, 1876, conveyed a tract of land to E. and A., the wives of B. and H., and, to secure a residue of the purchase money to V., at the same time E. and A., together with their husbands, made a deed of trust to R.,

trustee, the acknowledgment of which was wholly insufficient. *Held*, that although said trust deed conveyed no title from the wives to the trustee, yet the two deeds must be taken together, and an equitable lien is thereby created in favor of V., which can only be enforced in a court of equity. (pp. 543-544).

3. EQUITABLE-LIEN—*Assignable.*
Such equitable lien is assignable, and may be enforced in a court of equity by the assignee. (p. 547).

4. TRUST-DEED—*Acknowledgment—Sale.*
A sale under such deed of trust by the trustee, after giving the statutory notice, is a nullity, and a deed executed by the trustee in pursuance of such sale conveys no title to the purchaser. (p. 547).

Appeal from Circuit Court, Cabell County.

Suit by W. E. Schmertz and others against James Hammond and others. Decree for plaintiffs, and defendants, Samuel C. Koonce and others, appeal.

Reversed.

CHARLES KOONCE, Jr., and W. P. HUBBARD, for appellants.

SIMMS & ENSLOW, for appellee.

McWHORTER, PRESIDENT:

A. M. Black and James Hammond, brothers-in-law, one living in Illinois, the other in Ohio, about the year 1875 removed to Wayne County, West Virginia. They purchased five hundred acres of land near Cassville, in said county, and two lots in Cassville, from S. S. Vinson, for which farm and lots they were to pay sixteen thousand dollars, and took title bond from Vinson for same; and, having paid said Vinson something over one-half the price of said property, on the 22d day of November, 1876, they asked Vinson to convey the property to their wives, Elizabeth R. Black and Amanda Hammond, and to take from them a deed of trust on the land of the same date, to secure the payment of the purchase money still remaining unpaid. The conveyance to the women and the deed of trust were accordingly executed on the said 22d day of November, 1876, the deed of trust being executed by the said women and their husbands, and both deeds were duly recorded. Soon after going to Wayne County, the said A. M. Black and James Hammond, as partners under the firm name of

Black & Hammond, went into business as retail merchants in Cassville, and as such became indebted to the amount of several thousands of dollars. In 1877 suits were brought against them, and in July, October, and December of that year, and in August, 1878, judgments were rendered for various amounts against them. On the 4th day of March, 1878, George F. Ratliff, the trustee named in the trust deed from the Blacks and Hammonds to Vinson, conveyed to Samuel C. Koonce the said three tracts of land, near Cassville, he having become the purchaser thereof at a sale made by said trustee under said deed of trust, at the price of nine thousand one hundred and nine dollars and thirty cents; and on the 13th day of September, 1878, in consideration of ten thousand dollars, said Samuel C. Koonce and Amanda E. Koonce, his wife, conveyed the same to Charles Koonce, of Mercer County, Pennsylvania, which deeds were duly recorded in the clerk's office of the county court of Wayne County in the same months in which they were respectively made and executed. On the 25th day of December, 1882, W. E. Schmertz & Co., Ott, Hall & Co., Evans & Grimes, J. Klee & Co., J. C. Hopple & Co., Mack, Stadler & Co., A. Bradley & Co., and Duncan, Ford & Elder sued out of the clerk's office of the circuit court of Wayne County their subpeona in chancery, and filed their bill against A. M. Black, James Hammond, Elizabeth R. Black, Amanda Hammond, S. S. Vinson, Samuel C. Koonce, G. F. Ratliff, trustee, and A. M. Black, James Hammond, J. G. Lacy, and B. W. Lacy, late partners as James Hammond & Co., W. H. Koonce, and the unknown heirs of Charles Koonce, deceased, setting up their several judgments recovered against the firms of Black & Hammond and J. Hammond & Co., alleging that all of said judgments, and each of them, remained unpaid and unsatisfied, in whole and in part; that none of said judgment defendants had any personal property in this State out of which the same could be made or satisfied, and had not had since said judgments were recovered, and that each of them were liens upon the lands thereinafter mentioned; that the judgment defendants, in the years 1875, 1876 1877, and 1878, were merchants doing business in Wayne County, and in the course of their business contracted the

debts for which said judgments were obtained, and that during the continuance of said business in those years, and especially in the year 1875, and the early part of the year 1876, said defendant firms were largely indebted to various parties, among whom were complainants, and while that indebtedness existed the said Black and Hammond, both members of the defendant firms, for the purpose of hindering, delaying, and defrauding their creditors, among whom were complainants, purchased from S. S. Vinson, for the sum of sixteen thousand dollars by them paid, three tracts of very valuable and improved lands in said county, situate about one mile below the forks of Sandy river, containing five hundred acres, and two valuable lots in the town of Cassville, and had the legal title of the same conveyed to their said wives, Elizabeth R. Black and Amanda Hammond, by the said Vinson and wife, by deed dated November 22, 1876, a copy of which was exhibited with the bill; that all the money and funds used in payment for said lands to said Vinson belonged to said A. M. Black and J. Hammond, and not one dollar of the money so paid belonged to the said Elizabeth R. Black or Amanda Hammond; that the said Elizabeth and Amanda knew of said indebtedness of their said husbands, and that they had procured the said title to be made by said Vinson and wife to them, their said wives, to hinder, delay, and defraud their said creditors in the collection of their said debts; that, after the conveyance of the lands to Elizabeth and Amanda, they undertook and attempted to convey the same by a pretended deed of trust to George F. Ratliff, trustee, to secure the payment to S. S. Vinson of two promissory notes, one for one thousand five hundred and sixty dollars, the other for six thousand seven hundred and twenty-four dollars and eighteen cents, and the interest thereon, and exhibited a copy of said trust deed; that said pretended deed of trust to Ratliff was never executed and acknowledged by the said married women, Elizabeth and Amanda, as required by law, and that the same was null and void, and that the legal title was still in the said married women; that, some time after the pretended execution of said trust deed, the said A. M. Black and J. Hammond, with their own money or means, paid off said

notes to said Vinson, and that a few days after said payment they went back to said Vinson, either in person or by their agent or attorney, M. J. Ferguson, Esq., and had the said Vinson assign the said notes, without any recourse whatever, to Samuel C. Koonce, the son-in-law of A. M. Black, and the nephew of said J. Hammond, and said Koonce took said assigned notes which had been paid by said Black & Hammond, or with their means, and had said Ratliff, trustee, to advertise and sell said three tracts of land under said pretended trust deed, and at the pretended sale said Koonce became the purchaser for the amount of said notes, and said trustee, by deed of date March 4, 1878, attempted to convey the said three tracts to Koonce, and exhibited a copy of the deed to Koonce; that said Koonce knowingly took said assigned notes, which had been paid and requested and caused said sale under said pretended trust deed, and bought said lands at said sale, all for the purpose and with intent of aiding and assisting the said A. M. Black and J. Hammond to hinder, delay, and defraud their creditors; that for the said assigned notes, or for the said pretended purchase of said lands, the said Koonce paid nothing out of his own moneys or means, but the moneys used in both transactions belonged to the said A. M. Black and the said J. Hammond; that said Samuel C. Koonce, without any valuable consideration, attempted, by a pretended deed bearing date September 30, 1878, to convey said tracts of land to his father, Charles Koonce, since deceased, and exhibited a copy of the deed; that said Charles Koonce was informed of and knew the fraudulent purpose for which said deed was made to him, to aid in hindering, delaying, and defrauding the said creditors in the collection of their claims against said Black & Hammond; that the Blacks and Hammonds retained possession and control of said tracts of land after said pretended purchase, under the trust deed by Koonce, and still held possession and control, and used it as their own, without paying any rents; that said purchase of said lands and lots by said Black and Hammond in the names of their wives, and taking the legal title in their wives, and the pretended trust deed and pretended assignment of said notes, and pretended sale and purchase of said lands

under said trust deed, and the pretended conveyance to Charles Koonce, did hinder, delay, and defraud the said creditors in the collection of their debts, and that all the acts and doings of the said A. M. Black and his wife and of J. Hammond and his wife and the said Koonce, in all the said transactions, shifts, and devices, were knowingly done by them for the purpose of hindering, delaying, and defrauding plaintiffs in the collection of their claims, and they did so hinder, delay, and defraud them; that plaintiffs never discovered the frauds in the transactions aforesaid until the summer of 1882; and prayed that the deed from Vinson and wife to Elizabeth R. Black and Amanda Hammond should be declared fraudulent, null and void as to plaintiffs' claims; that the deed of trust to said Ratliff be declared null and void; that the deed from Ratliff to S. C. Koonce, and the deed of the latter to his father, Charles Koonce, be set aside, and declared null and void, and that said judgments, and each of them, be declared existing liens upon the tracts of land and two lots; that said lands and lots be sold to satisfy same; and for general relief.

Defendant Samuel C. Koonce filed his answer, filing with it a copy of the last will and testament of his father, Charles Koonce, whereby respondent William H. Koonce and George W. Philips were appointed executors thereof; said he had no personal knowledge of the recovery of the judgments set up in the bill, nor whether they had been paid in whole or in part, and had no knowledge nor information, and could state nothing, as to the personal property, or its value, owned or claimed by the defendants in said judgments, or either of them, at the time mentioned in the bill, or at any other time, but denied, on information and belief, that said judgments, or either of them, were liens on the real estate, or any part of it, mentioned in the bill and in question in this suit; that he was not informed and could not state what business the judgment defendants, or either of them, were engaged in, in either of the years 1875, 1876, 1877, 1878, nor when the debts for which the judgments were rendered were contracted, nor as to the extent of the indebtedness of the said defendants or either

of them, at the dates mentioned in the bill; admitted the purchase by Black & Hammond of the property for sixteen thousand dollars, but did not know the date thereof, nor the purpose and intent of Black & Hammond in making such purchases, whether for the purpose of hindering, delaying, and defrauding their creditors, including the plaintiffs, or otherwise, and, if they purchased with such intention as charged in the bill, denied that he ever had any knowledge or information of any such purpose or intent on the part of either of them; admitted that said Black & Hammond caused a deed for said real estate to be made by said Vinson and wife, purporting to convey the title to said real estate to Elizabeth R. Black, the wife of A. M. Black, and Amanda Hammond, the wife of James Hammond, bearing date November 22, 1876, a copy of which is filed with the bill, and referred to it as part of his answer, but, on information and belief, denied that the legal title to said real estate, purporting to be thereby conveyed, thereby vested in said grantees, or either of them, in said deed, under and by virtue thereof, for the reasons stated in the next paragraph of the answer, as follows: "(8) This defendant here avers, answers, and says that on the said 22d day of November, 1876, when the deed mentioned above was executed by the said S. S. Vinson and wife, the said Vinson held a valid and subsisting lien on the said real estate for the payment of the purchase money thereof remaining unpaid to him by the said Black & Hammond, amounting to the sum of eight thousand, two hundred and eighty-four dollars and forty-eight cents, and, for the purpose of continuing and preserving the said lien of said Vinson on said real estate in full force and effect as long as the said balance of purchase money remained unpaid, the said A. M. Black and Elizabeth R., his wife, and James Hammond and Amanda, his wife, at the same time and place of the execution by the said Vinson and wife of the deed aforesaid, and before the delivery thereof, and as a part and parcel of one and the same transaction, executed to the defendant, George Ratliff, trustee, a deed of trust, whereby they conveyed to said trustee the same real estate mentioned, described, and conveyed by the deed aforesaid of said Vinson and wife,

for the purpose of preserving and continuing in force the said lien of said Vinson on said real estate, and thereby securing the payment of the said sum (eight thousand, two hundred and eighty-four dollars and forty-eight cents), with the interest thereon, to the said Vinson, when the same becomes due and payable, as provided in said deed of trust; and this defendant further avers, answers, and says, that the said deed of said Vinson and wife, and the said deed of trust, were executed, acknowledged, and delivered simultaneously with each other, and as part and parcel of one and the same transaction, as hereinbefore stated, for the uses and purposes stated in said deed of trust; and this defendant, therefore, denies that the said deed of trust is null and void for the reason alleged in said bill, or for any other reason, but, on the contrary thereof, he is advised and believes, and so avers, that the said deed of trust was at the date of its execution, and still is, a valid and binding deed, for the uses and purposes herein mentioned, and he also denies that the legal title of said lands is in the said Elizabeth R. Black, and Amanda Hammond, or either of them, as alleged in said bill." Respondent denies each and every allegation of the bill that the defendants Black and Hammond, or either of them, with their own money or means, paid the whole of the sixteen thousand dollars purchase money of said real estate, or that they, or either of them, paid off to said Vinson the notes mentioned in the trust deed; admits the assignment of the notes, but denies that they had been paid off, in whole or in part, by any person whatever; admits that he was at the time of the assignment, and is yet, the son-in-law of A. M. Black, and that his wife is the neice of said Amanda Hammond; that he caused the real estate to be sold by the trustee; that he became the purchaser, but not for the amount of said notes, as alleged, and that said real estate was conveyed to him by the trustee by deed dated the 4th of March, 1878, but positively denies each and every allegation of the bill that in any way charges that he knowingly took said assigned notes which had been paid off, as charged and requested, and caused said sale under said pretended trust deed, and bought said lands at said sale, all for the purpose and with the intent of aiding and as-

sisting the said A. M. Black and J. Hammond to hinder, delay, and defraud their creditors; that, on the contrary, all those things were done by him in good faith, and with out any knowledge or information of any such purpose or intent on the part of said Black & Hammond, or either of them, as to hinder, delay, and defraud their creditors mentioned in the bill, or any other creditors they may have had, and without any purpose or intent on his part to aid the said Black & Hammond, or either of them, in hindering, delaying, or defrauding their creditors, or any of them, mentioned in the bill, or any other creditors they or either of them may have had; and avers that said notes, and each of them, mentioned in the deed of trust, as well as the deed of trust, were each and all of them in full force and effect, and the notes, and each of them, were wholly unpaid, at the date of the assignment thereof to him; avers that he resides in Mercer County Pennsylvania, several hundred miles from Wayne County, West Virginia, and never was in Wayne County, excepting the year before Black & Hammond moved there, until November, 1877, when he and his wife visited A. M. Black at his residence on the real estate purchased from Vinson, and while there learned of the purchase by Black & Hammond and the execution of the notes and deed of trust, and that Vinson was intending to cause the sale under the deed of trust, and while there respondent's wife handed him five thousand, five hundred dollars, without saying from whom she received it, and directed him to pay it to Vinson on the debt mentioned in the deed of trust, which he did, and at the same time promised said Vinson to pay him the balance of said debt within sixty days from that date; that before that time expired the property was advertised for sale under the trust deed for the balance due Vinson; that, Black & Hammond not being able to raise the money to pay the same, respondent, at Black's request, borrowed the sum necessary from his father, Charles Koonce, and paid said debt in full to Vinson, and for indemnity took the assignment of said notes and deed of trust, and filed the assignment with his answer. Respondent admits the five thousand, five hundred dollars received from his wife was the money of A. M. Black, and from his previous knowledge of

the very small business capacity of said Black & Hammond, and their reckless ventures at speculation, before their removal to Wayne County, he determined to have said real estate sold under the trust deed, and to purchase the same, and take the deed in his own name, and hold it as his own property, and accordingly did purchase it at nine thousand, one hundred and nine dollars and thirty cents, and the same was conveyed to him. Respondent denies that he paid nothing out of his own moneys or means, but used the moneys and means in both transactions of A. M. Black and J. Hammond, and that the land was conveyed by him to Charles Koonce without any consideration, and that said Charles Koonce was informed of and knew the fraudulent purpose for which said deed of September 30, 1878, was made to him, to aid in hindering, delaying, and defrauding creditors in the collection of their claims against Black & Hammond, and avers that such allegations relating to his dead father, Charles Koonce, are a wanton and inexcusable slander upon his memory; avers that these denials are made on his own knowledge of the several transactions and matters to which they relate, and of his own knowledge avers that the sale under the trust deed, his purchase of the real estate thereunder, and the conveyance to him, and his sale and conveyance thereof to Charles Koonce, his father, were all made and done in good faith, for valuable consideration, and without any fraud or intended fraud on the part of any of the parties thereto; that, at the time he agreed to pay Vinson the balance of the debt of Black & Hammond, he was ignorant of his indebtedness to others than said Vinson, and a debt of said Black to Charles Koonce and himself, and after the sale was advertised at which he purchased, and before the sale was made, one T. C. Grove, a creditor of Black & Hammond, enjoined the sale in the United States district court, claiming an indebtedness of three thousand, three hundred dollars; Black & Hammond admitted the justness of the debt to Grove, and authorized respondent to compromise and pay it, which he did, for the sum of two thousand, three hundred dollars, in full satisfaction, and refers to depositions proving the same as part of his answer, and by agreement with Black the said two thousand, three hundred

dollars was credited on the five thousand, five hundred respondent received from his wife and paid to Vinson; the balance of the five thousand, five hundred dollars was, by agreement with Black, repaid to him and others, by his orders, as shown in Exhibit D, with said answer; avers that he borrowed from his father the said two thousand, three hundred dollars, which he paid to Grove, which sum, together with previous indebtedness to his father, made his whole indebtedness to him something over ten thousand dollars, and, being unable to pay him in money, he sold and conveyed the real estate to him for ten thousand dollars, in payment of his indebtedness to him to that extent; and avers that at the time he paid said money to Vinson and to Grove, and at the time he paid the balance of the five thousand, five hundred dollars, he had no sort of knowledge or information of the alleged indebtedness of said Black & Hammond to plaintiffs, or any of them, mentioned in the bill; admits that Black & Hammond remained in possession of the real estate after the sale, but denies that they, or either of them, retained control of it, or that said Black, or any of his family, were in possession at the time of his answer, but had long since abandoned the possession and removed from it; that after the sale and conveyance to respondent, and in consideration of the relationship existing between said Blacks and Hammonds and respondent and his wife, he permitted them to remain in possession of said real estate as his tenants, without payment of rent, beyond paying the taxes, which they paid until his sale and conveyance to his father, after which last conveyance his father, at his request, permitted the Blacks and Hammonds to remain in possession to the time of his death, in 1880, without paying rent or other consideration, except the payment of taxes, and after his death they still remained in possession as before until the fall of 1883, when, by direction of W. H. Koonce and George W. Philips, two of the executors, notice was given them that they must pay rent or remove, and respondent caused the lease to be prepared in the name of all the executors, leasing said real estate to Elizabeth R. Black and Amanda Hammond for a term of two years from and after March 1, 1884, at a rent of five hundred dollars per year, which the

said two executors refused to sign, but agreed that respondent might give said lease to the lessees named, if he would be responsible for the payment of the rent mentioned. Upon the 18th day of December, 1883, said lease was executed, and respondent, together with James A. Black and Charles A. Hammond, by writing indorsed on said lease and signed by them, agreed to pay the rent, in case the lessees failed to pay, and, by another indorsement on said lease, the adult heirs and devisees of Charles Koonce approved said lease, and, the lessees failing to pay the rent in whole or in part, respondent was charged by the other executors on the books of the estate with the sum of one thousand dollars, as shown by the deposition of W. H. Koonce. This suit in the meantime having been commenced, and the taxes having been regularly collected from the tenants, and would continue to be so collected, the executors were advised by their attorneys to defer legal proceedings to eject them until the determination of this suit. Respondent denies that plaintiffs never discovered the frauds in the transactions aforesaid until the summer of 1882, and denies that there was any fraud to be discovered in any of the transactions referred to in their allegations, committed or intended by this defendant or his father, Charles Koonce, or by any person or persons in any way connected with them or either of them, unless it was by A. M. Black, Elizabeth R. Black, James Hammond, and Amanda Hammond, and, if they or either of them committed or intended to commit any of the frauds in any of the transactions mentioned, the respondent never had, and has not now, any knowledge in regard to it, and avers that by their own showing plaintiffs had the means of knowing, and they did know, as much in regard to the alleged frauds, if any, committed by said Black & Hammond and their wives, in the year 1876, as they did in 1882, when this suit was brought, which was more than five years after the recordation of said deed from Vinson and wife to the wives of said Black & Hammond, and that plaintiffs stood by all these years, and permitted the sale of said real estate under said deed of trust, and purchase thereof by respondent, and the conveyance thereof to him by deed of the 4th of March, 1878, and permitted respond-

ent to pay the debt of Black & Hammond to said Grove, and to pay back the balance of the said five thousand, five hundred dollars to said Black and to sell and convey the said real estate to his father, Charles Koonce, which deed to his father was recorded the 25th of September, 1878, and never in any way set up any claim against the said real estate, or made any objection against the validity and good faith of any of said transactions, until more than two years after the death of said Charles Koonce and avers that the said plaintiffs, and each of them, have been guilty of such laches in the prosecution of their said claims as, under the facts and circumstances of this case, is a bar in equity to the relief or any part thereof, prayed for in their said bill.

The defendants, William H. Koonce and George W. Philips, executors of Charles Koonce, deceased, Samuel C. Koonce, as trustee of said William H. Koonce, under the will of Charles, Sarah McKenney, late Sarah Wilson, and Rachel Philips, Lilly Bartholomew, Clyde Bartholomew, Hayward Bartholomew, Ethel Bartholomew, W. W. Zimmerman, H. A. Zimmerman, Charles Koonce, and Mary Koonce filed their joint and several answer, saying that they have no personal knowlege of the business in which the defendants in the judgments alleged in the bill were engaged, admit the recovery and recordation of the judgments, but, on information and belief, deny they are liens on the real estate in question.

The defendant, Samuel C. Koonce, trustee of William H. Koonce, for a separate answer to said bill, refers to his answer as executor and in his own right, and asks that it be made a part of this answer. And the other defendants admit that Charles Koonce died seised and possessed in fee of the real estate in question in this suit, and this is all they know in relation to the said real estate; they know nothing of the purchase by defendants Black & Hammond, or the object for which they purchased, or the object and purpose for which they caused said lands to be conveyed by Vinson and wife to their wives, nor of the dealings of said Black & Hammond, or either of them, with Vinson, either in person or through their attorney, M. J. Ferguson, or of the dealings of said Samuel C. Koonce with said

Black & Hammond, or either of them, in relation to said lands, nor of the transactions preceding, mentioned in said bill, whereby Samuel became the purchaser and grantee, or the dealings between Samuel and his father, Charles, whereby said Charles became the owner in fee of said lands, and therefore they neither admit nor deny the said allegations of the bill, but demand full proof of said allegations, and each of them, and refer to the answer of Samuel C. Koonce as a full and complete answer and explanation of all said matters and things charged in the bill, and ask that said answer be read and considered as part of theirs.

The cause came on to be heard at the July term, 1897, and it was held by the court that the deed executed by the wives of defendants Black & Hammond to Ratliff, trustee, was defective, and passed no title to him; that the legal title to the farm below the town of Cassville, in Wayne County, set out in plaintiffs' bill, is still vested in Amanda Hammond and Elizabeth Black; that they hold the same subject to the rights of the creditors of Black & Hammond and J. Hammond & Co.; and that the purchase money for said farm was paid by said Black & Hammond; and that the conveyance of said land procured to be made by the said Black & Hammond to their wives, Amanda Hammond and Elizabeth Black, was made with the intent to hinder, delay, and defraud the creditors; and that the acts of said Samuel C. Koonce, in discharging, or attempting to discharge and pay off, the trust-deed liens, and the taking of a conveyance of the farm below Cassville bought of S. S. Vinson, to himself, through the trustee, Ratliff, were all made with intent to hinder, delay, and defraud the creditors of said Black & Hammond; and that the conveyance to Samuel C. Koonce of the farm below Cassville from George F. Ratliff, and the deed from Samuel C. Koonce to his father, Charles Koonce, were made with the full knowledge of the said S. C. Koonce of all the facts, and with the intent to hinder, delay, and defraud the creditors of said Black & Hammond and J. Hammond & Co.; and that a deed was executed to Charles Koonce by Samuel C. Koonce, who was acting as agent for his father, Charles Koonce, and that the same conveyed no title to the said Charles Koonce as against the plaintiffs' claim; and it was

decreed that said conveyance dated the 22 day of November, 1876, by Vinson and his wife, and the trust deed of the same date to George F. Ratliff, and the deed of March 4, 1878, from Ratliff to Samuel C. Koonce, and the deed of September 30, 1878, of S. C. Koonce to Charles Koonce, were fraudulent, null and void, and as such were set aside so far as affected the rights of the judgment creditors, and the land was decreed to be sold; from which decree Samuel C. Koonce, William H. Koonce, and George W. Philips, executors of the last will and testament of Charles Koonce, deceased, and Samuel C. Koonce, in his own right and as trustee for William H. Koonce, appealed to this Court.

It is assigned as error that the court refused to compel the witness Amanda Hammond to produce a written agreement between the plaintiffs and herself, in pursuance of which she was testifying as a witness for the plaintiffs in the cause. In her testimony on cross-examination, Mrs. Hammond admitted that there was a written agreement between the creditors suing in this case and herself but refused to produce it or disclose its contents, stating that she had signed it herself, but refused to say who had signed it on behalf of the creditors, and that such refusal was under advice of her counsel. Notice was then given by appellants' counsel that he would move the court to compel the production of the agreement, and move to reject her testimony, unless it should be produced. Witness, Charles Hammond, son of said Amanda Hammond, was asked, on cross-examination, whether he knew of any arrangement between him and his mother, or either of them, or any of his family, and the plaintiffs or their attorneys, as to what disposition was to be made of the property in case the plaintiffs in this cause should recover. He replied, "Well, mother has assigned her interest away there in the place. Q. Who to? A. To settle her claim with the creditors. I believe she has settled her interest with them." He says the contract was in writing, that he read it, but when asked, "How did it read?" on objection by Mrs. Hammond, by counsel, he declined to answer. M. J. Ferguson, attorney for defendants, filed his affidavit (which affidavit is not copied into the record, but, by consent, the oirginal may be read in the Appellate Court) to

the effect that Amanda Hammond, James Hammond (the latter since deceased), and Charles Hammond had testified in the cause. Said Amanda and her son, Charles, had lately given their testimony the second time for the plaintiffs, when, on cross examination, he called on both of said witnesses to state the contents of said agreement, and both, under the advice of counsel for Mrs. Hammond, refused to do so, and demanded the production by said Amanda of said agreement, and moved the court to require its production before the court, before the decision of this case, so that it could be made a part of the record, which the court refused to do. That affiant had learned from a gentleman acquainted with the contents of the agreement (as he represented to affiant, and of the truth of which representation affiant had no doubt) that (according to such representation of the contents of said paper) it was, in substance, an agreement on the part of the Hammonds to testify in this case as witnesses for the plaintiffs, and in consideration of the said agreement the plaintiffs, in case they should recover a judgment and decree in this case, were to convey a part of the lands in controversy to Mrs. Hammond, and that said corrupt agreement was of such a character that the production and entry as part of the record in the case would tend very greatly, and probably entirely, to destroy the credibility of all the Hammonds who signed it as parties to it in this cause, and aid very materially the defense of the defendants, for whom affiant appeared as counsel. The court ordered the affidavit to be filed as a proper paper to be filed in the cause, but, being of the opinion that the contract between the defendants Amanda Hammond and Charles Hammond should not be required to be filed over the objections of defendants Charles Hammond and Amanda Hammond, refused to require it to be filed. It is very evident that the witness Amanda Hammond was testifying in pursuance of a corrupt agreement between herself and the creditors or some of them. Section 644, Chamberlayne's Best, Ev., gives it as one way of discrediting an adversary's witness "by proving misconduct connected with the proceedings, or other circumstances showing that he does not stand indifferent between the conflicting parties. Thus, it may be proved

that a witness has been bribed to give his evidence." The existing relations of the witness with the adverse party may be shown on cross-examination. 1 Greenl. Ev. section 450. The plaintiffs consented that the contract or agreement might be filed, but it was refused, on the objection of Amanda Hammond and Charles Hammond. The court should have required the production of the agreement, and, on refusal to produce it, the evidence of Amanda Hammond should have been excluded.

The second assignment is that "the court erred in holding and decreeing that each and every of the deeds mentioned in the bill was inoperative, fraudulent, null, and void, and made with intent and for the purpose of hindering, delaying, and defrauding the plaintiffs in the collection of their said debts," and this involves also the third and fourth assignments, which are as follows: "(3) The court erred in holding and decreeing that no title vested in the trustee in said deed of trust by reason of the said defective acknowlegment thereof by the said married women, who, at the time of the execution and acknowledgment thereof by themselves and their said husbands, who were the equitable owners of said lands, to the extent of the payment of the purchase thereof paid by them, up to that time, and the said married women not being vested even with the dry legal title to said lands and lots at the time of the execution and acknowledgment of said deed of trust. (4) The court erred in holding that no title passed to your petitioner, Samuel C. Koonce, to the real estate in question, because of the said defect in said acknowledgment of said deed of trust, for the reasons stated in the third assignment of error." It is insisted by appellees that the trust deed made by Mrs. Black and Mrs. Hammond and their husbands to secure Vinson in the payment of the residue of the purchase money, because of defect in acknowledgment, was utterly void and of no effect; while it is contended by appellants that, taken together with the deed from Vinson to the women, it was made effective to convey their title, notwithstanding the defective acknowledgment; that the execution of the two deeds constituted one and the same transaction, and must be taken as one; that the women had put no money into the property,

and had no interest in it, and only received the "dry legal title." Appellants cite *Gilliam* v. *Moore*, 4 Leigh 30, which is a case where A. conveyed a parcel of land to B., and B., by deed of same date, conveyed the same to a trustee to secure the purchase money thereof to A. It was held that the two conveyances should be considered parts of the same transaction, and the seisin of B. was instantaneous and transitory, so that B.'s widow was not entitled to dower in the land. The deed from B. to the trustee in that case was sufficient to and did convey the title. So, in the other cases cited by appellants (*White* v. *Brocaw*, 14 Ohio St. 339; *Holmes* v. *Wintler* (C. C.) 47 Fed. 257); in which latter case it is held: "A conveyance of title to real estate, and a mortgage to the vendor for part of the purchase money, delivered simultaneously, constituted but one transaction, and the title of the vendee is from its inception incumbranced by the mortgage." Also *Balfour* v. *Parkinson*, (C. C.) 84 Fed. 855. The deed from Vinson to the women was an absolute conveyance, with general warranty, the original consideration being sixteen thousand dollars, with over one-half of the purchase money paid, whereby much more than the dry legal title was vested in them. As between the parties (Vinson and the Blacks and Hammonds), they had the whole title, legal and equitable, subject only to the balance of the purchase money to Vinson. The deed of trust being made simultaneously with the deed to the women from Vinson, and being intended to secure the residue of the purchase money due to Vinson, would be held to be in equity a part of same transaction, and an equitable lien for the purchase money, because the parties intended to create a lien; but such lien could only be enforced in a court of equity. The deed having been made to them in good faith, and they in like good faith having attempted to convey the land in trust to secure the residue of the purchase money, a court of equity would enforce a lien. The women would not be permitted to hold and enjoy the property, and not pay the consideration. "A vendor's lien is founded upon the equitable proposition that he who has gotten the estate of another ought not to retain it without paying the full consideration therefor." 2 Warv. Vend. p. 694, § 2; *Id.* p. 704,

§ 11; *Wood* v. *Wheeler*, 106 N. C. 512, (11 S. E. 590). While the deed from Vinson to the women was good as between the parties and conveyed to them the legal and equitable title, and they could only be devested of the title by a conveyance on their part properly acknowledged and recorded, or by the enforcement in a court of equity of the equitable lien of said Vinson as set out in said deed of trust, yet the same was made in fraud of the rights of the creditors of Black & Hammond, among whom were the plaintiffs. As to the object and purpose of the conveyance to the women, there can be no question. In the fall of 1877, A. M. Black paid to Vinson seven thousand dollars in cash on account of said trust debt, and took Vinson's receipt therefor; but his (Black's) counsel learning of the fact, expressed his dissatisfaction with the payment, and within a very short time on the same day caused the money to be returned, and Vinson's receipt therefor returned to him. This would be a simple payment on account of the deed of trust, and was not in harmony with the scheme that was being worked under the advice of their counsel. It seems that in some way they had misapprehended their advice, and, instead of arranging with some outside party to buy the residue of the trust debt with the debtor's money, they had paid it directly on account of the debt, which they had a right and which it was their duty to do. At this most opportune time, while the trust debtors still had the money with which they could have paid the greater part of the debt then remaining due and unpaid, S. C. Koonce, the son-in-law of the one and nephew of the other of the debtors, together with his wife, appeared on the scene,—happened there on a visit,—and within two days after their arrival Mrs. Koonce handed her husband the sum of five thousand five hundred dollars in money, with the request that he pay it to Vinson on the trust deed. And on the 8th of November, 1877, Mr. Vinson says, in a few days after Black had paid and taken back the seven thousand dollars, "Sam Koonce came and asked me if he would pay off the deed of trust if I would sign it over to him. I told him I would. Sam Koonce came and paid me, I am sure the same five thousand dollars, and an extra five hundred dollar bill; then gave me a draft on his father for the remainder, and I

signed over the deed of trust to him." The amount paid by Koonce, in addition to the five thousand five hundred dollars, was three thousand two hundred and fifty-four dollars and nineteen cents. This sum of five thousand five hundred dollars is admitted by appellant to be the money of A. M. Black. S. C. Koonce says he advised with M. J. Ferguson, who was the counsel of Black & Hammond, in every step he took in relation to that transaction; that he had confidence in Mr. Ferguson, who said "that I ought to buy that land in, and secure a home for Mrs. Black and Mrs. Hammond." Although Mr. Koonce claims to have known nothing about the business or financial condition of Black & Hammond, he is advised by their counsel to buy in the property to secure a home for their wives, his mother-in-law and aunt, and takes and uses a large sum of their money in the execution of that purpose, and is met when he undertakes to have a sale under the trust deed, by an injunction by one of the large creditors of Black & Hammond, which debt he compromised that the sale might proceed, and then claims to have returned to Black the money used by him in purchasing the trust debt. Is it at all probable that the son-in-law, an active business man, visiting his wife's people, finding them in business, owning valuable property partially paid for, and being advised by their counsel to buy in the property,—the farm,—so as to secure a home for his mother-in-law and aunt, would know nothing of their financial circumstances, as is claimed by Mr. Koonce? To me nothing could be more unlikely. Although Trustee Ratliff conveyed the land to S. C. Koonce by deed dated on the 4th day of March, 1878, Vinson's vendees were left in possession of it for several years thereafter, and until a year after the institution of this suit, December 18, 1883, when they were induced to take a lease for said land from the executors of Charles Koonce, to remain in possession as their tenants. Although it is claimed by appellant that the Blacks and Hammonds were holding under him from the time of his purchase from the trustee, yet he admits that they were taxed with it and paid the taxes all that time. If it be true that the lien of the vendor, Vinson, could only be enforced in a court of equity, then it follows that a sale made in the ordinary

way, as under a deed of trust properly executed, would be a nullity, and the purchaser would take no title. This being the source of the title taken by S. C. Koonce from Trustee Ratliff, he had no title to convey to Charles Koonce, and the title is still vested in the Black and Hammond women. It is contended by appellants that they are, at least, entitled to a decree for a lien on the lands for the amount of the purchase money paid by S. C. Koonce under the deed of trust, with interest. S. C. Koonce paid for said deed of trust, and took an assignment thereof to himself, the sum of five thousand five hundred dollars of the money of A. M. Black, one of the debtors, and paid with his own funds the residue of the amount due Vinson, the sum of three thousand two hundred and fifty-four dollars and nineteen cents, on the 8th day of November, 1877. This purchase money due Vinson was assignable, together with the equitable lien to secure the same. 2 Sugd. Vend. (8th Am. Ed.) 398; *Griffin* v. *Camack*, 36 Ala. 695; *Griggsby* v. *Hair*, 25 Ala. 327; *McAlpin* v. *Burnett*, 19 Tex. 497; *Rakestraw* v. *Hamilton*, 14 Iowa, 147; *Cummings* v. *Oglesby*, 50 Miss. 153; *Boies* v. *Benham*. 127 N. Y. 620, (28 N. E. 657), 14 L. R. A. 55; *Henderson* v. *Goode*, (C. C.) 49 Fed. 887. In *Board* v. *Wilson*, 34 W. Va. 609, (12 S. E. 778), it is held: "The assignee of a single bill, which was executed for the purchase money of a tract of land, has the right to assert and enforce the vendor's lien in a court of equity, whenever such vendor would be entitled to enforce the same." *Poe* v. *Paxton's Heirs*, 26 W. Va. 607; *James* v. *Burbridge*, 33 W. Va. 272, (10 S. E. 396). The sum of three thousand two hundred and fifty-four dollars and nineteen cents, the amount paid from his own funds by S. C. Koonce to Vinson for the purchase and assignment thereof, with interest from November 8, 1877, the date of the assignment, is the first lien upon the property, and in favor of the assignee of Vinson.

Appellees claim that there was returned to S. C. Koonce by Black & Hammond four items—, one of six hundred dollars, from James Black in a mineral land transaction with John Bartram; one of six hundred dollars, paid him by the government for "damages;" one of three hundred and fifty dollars, paid by James Black in a land sale; and

one of two thousand five hundred dollars, from Grove. As to the first item, Bartram says the Blacks let him have a mule team in the transaction, but all he knows of the matter was an understanding he had from the Blacks, but in the absence of Koonce; and Koonce says the Hammonds nor Blacks had anything to do with it, as far as he knew. The six hundred dollars paid by the government for damages was paid to the executors of Charles Koonce, while the Grove claim of two thousand five hundred dollars was a claim Grove had against A. M. Black and Hammond for something like three thousand dollars, which Koonce purchased on compromise from Grove, or paid with two thousand three hundred dollars as appears from the record. Appellant insists that, because of the laches of plaintiffs in bringing their suit, they should not be granted relief, and cites many authorities to sustain his position, which, if applicable, would probably be a good defense; but in the case at bar the legal title was vested in the wives of the debtors, without consideration, for the purpose of hindering, delaying, and defrauding their creditors, with the full knowledge and connivance of the defendant, who made the pretended purchase under the pretended deed of trust. The title remained in the women, and they remained in the possession of the property, living on it, enjoying the rents, issues, and profits, until long after this suit was brought; and it was instituted before the statute of limitations had run, and there is no pretense of pleading the statute of limitations. If the deed of trust had been valid, and conveyed the title, and a sale had been had under it, and the property had passed into the hands of an innocent purchaser, plaintiffs might well be charged with laches. The most of the judgments were recovered against Black & Hammond in the summer and fall of 1877, some months before the attempted sale under the deed of trust, and several of the judgments were rendered in the month immediately preceding the date on which appellant purchased the residue of the debt due to Vinson for the purchase money. For the reasons herein stated, the decree will be reversed, and the cause remanded for further proceedings to be had therein.

Reversed.

CHARLESTON.

MOORE v. MUSTOE *et al.*

Submitted February 1, 1900—Decided March 24, 1900.

1. RESULTING TRUST—*Control—Purchase.*
A resulting trust must arise at the time of the contract of purchase by virtue of the payment of the purchase money from the funds of the *cestui que trust*, or securing the same at that time to be thereafter paid, so as to make them a part of the contract of purchass. (p. 552).

2. EXPRESS TRUST—*Equity—Enforcement.*
An express trust will be enforced in equity where possession is held of, and valuable improvements are made on, the trust property by the *cestui que trust*, in pursuance of the contract of purchase (p. 552).

Appeal from Circuit Court, Randolph County.

Bill by Clara A. Moore against A. Mustoe and others. Decree for defendants, and plaintiff appeals.

Reversed.

A. B. PARSONS, for appellant.

E. D. TALBOTT, for appellees.

DENT, PRESIDENT:

This is a suit from the peaceful shades of Randolph County, instituted by Clara, intermarried with Eli Moore, of Montrose, against her pa, the Reverend Anthony Mustoe, of Breitz, near the happy land of Canaan, the neighboring county of Tucker. Clara's story is as follows: Eli's creditors becoming importunate, he found it necessary to make an assignment for their benefit. In this assignment he included an item of five hundred dollars for her, which she had no knowledge of; also a note for six hundred and thirty dollars in favor of her pa, which, however, was to be for her benefit. The circuit court, on application of the other creditors, struck out the five hundred

dollar item, without resistance on her part, but allowed the six hundred and thirty dollars in favor of her pa, and decreed the lands of Eli for sale. That her pa agreed to purchase for her at such sale three certain tracts of land, and did purchase them, to wit: A seventy-six acre tract, at the price of two hundred and sixty-nine; a seventy five acre tract, at the price of two hundred and fifty-five dollars, and a one-half acre lot, at the price of two hundred and thirty-one dollars,—aggregating seven hundred and forty-five dollars. On this amount the six hundred and thirty dollar note was to be credited, and the residue pa was to take in timber, tan bark, and rent. But, he becoming for some reason dilatory, she decided pa must toe the mark. So she sought the aid of a court of equity to bring him to time, and compel him to hand over the deed. Eli, like a faithful helpmeet, seconds her motion to the extent of his skill and ability. He says he knew creditors always wanted something to kick at, so he put in the five hundred dollar note to furnish them the necessary exercise. The six hundred and thirty dollar note, in the name of Clara's pa, was a bluff note; but the old gentleman had, much to his surprise, called him one better, and got away with the whole of his frugal savings, from his greedy creditors. A mere breach of trust, not fraud in law. *Currence* v. *Ward*, 43 W. Va. 368, (27 S. E. 329). Eli entered the contest badly disfigured. The backbone of his evidence had been broken by the obstruction put in its way in the execution of the deed of trust and the note under seal; solemn acts which cannot be easily explained away, and by which he is estopped from telling the truth, —not a great hardship on Eli. In addition, a number of his neighbors, notably among them two of his brothers-in-law, pa's sons, who are in a position to know, say his reputation for truth and veracity is not the best, and they do not hesitate to declare that they would not believe him under oath. Pa certainly could not induce the boys to swear thus falsely for the purpose of cheating their sister, even though Eli intimated in his evidence that pa had been guilty of forging his valuable name to some small notes. It is due to Eli to say, however, that a greater number of his neighbors have absolute confidence in his capacity to tell the truth, because they

do not know that he was ever caught in a lie. Pa Mustoe, with a few essential variations, tells about the same story as his dutiful children. He says he agreed to buy the lands in for Eli at the commissioner's sale on the representation by him that he had saved some money out of the assignment to pay for the same. After the lands were knocked down to him, he told Eli to show up. Eli, instead of doing so, wanted him to give a note, and he would sign it, and raise the money in that way. But pa was too well acquainted with Eli's note-paying ability to be caught napping. So he told Eli he would raise the money to pay the down payment, and he could pay it back to him, and meet the deferred payments, and then he could have the lands. Eli failed to meet the deferred payments, and the commissioner brought suit, and obtained a new decree of sale, and pa Mustoe, having realized about three hundred and sixty dollars out of the six hundred and thirty dollar bluff note, raised the remainder, paid up the purchase money in full, and took a deed for the property. The evidence tends to show that while pa Mustoe does a little preaching, trying to gather the lost sheep into the fold, and has one eye on the pearly gates, where the wicked cease from troubling and the weary are at rest, he keeps the other to windward in an endeavor to make friends with the Mammon of unrighteousness. While trying to serve two masters, he gives his present allegiance to the one he can see, taste, hear, feel, and smell, and puts the other off with a little preaching and the promise of a more convenient season. He says that he bought the lands for Eli, but several witnesses, bidders at the sale, say that he came to them during the bidding, and persuaded them not to continue bidding against him, as he was buying the lands for his daughter Clara. And they stopped, and let him have them, because there was a woman in it. He acknowledges that his son had him arrested, and thrown in jail, like poor old Bunyan, charged with burning down his own barn. He has not money enough to furnish a good consideration for the bluff note, and admits that ninety-seven dollars and ten cents was paid him by Clara through Eli to go on the land. He appears to have stumbled onto the truth here, and afterwards tries to correct himself, under the coach-

ing of his counsel. He is probably a little absent-minded. He makes a big effort to outswear several other witnesses in the case. His attainments in this direction will hardly win him a crown as a faithful servant when he presents his credentials at the golden gate of the New Jerusalem. The Good Book saith there is a place without for whosoever loveth and maketh a lie, and they shall in no wise enter therein. Though his prospects for a mansion beyond are uncertain, he has possession and title to the lands here. He would rather dwell in the tents of the wicked than be a doorkeeper in the house of the righteous. Equity never helps those engaged in fraudulent transactions, but leaves them where it finds them. Therefore the money that Eli succeeded in bluffing his creditors out of must remain the money of his trusted father-in-law,. He justly punishes Eli by keeping it. The fowler is caught in his own snare. He could not possibly permit his daughter to be the beneficiary of such a fraudulent transaction. It would not become a minister's daughter. So, he will just apply the money to the indebtedness of Eli, acknowledged by his note. With Clara it is somewhat different. She must suffer for the company she keeps. Yet the sins of both father and husband should not be imputed to her. Woman has always been a favorite with equity, and it always throws its willing arms around her to protect her from the importunity and duress of her impecunious husbands. See opinion of JUDGE BRANNON in case of *Schamp* v. *Association*, 44 W. Va. 50, (28 S. E. 709). A resulting trust cannot be implied in her favor, for the reason that her money was not used at the time of the purchase or entered into the consideration therefor. Nor was it paid thereafter in pursuance of such purchase. *Myers* v. *Myers* (W. Va.; decided at this term) 35 S. E. 868; *Webb* v. *Bailey*, 41 W. Va. 463, (23 S. E. 644). Nor can the express trust be enforced so far as the two tracts of land are concerned, for the reason that her pa relies on the statute of frauds, and his contract with Eli was nothing more than an option withdrawable at any time before acceptance. *Eclipse Oil Co.* v. *South Penn Oil Co.*, (W. Va.) 34 S. E. 923. When a man only preaches a little, and undertakes to deal in the transitory things of this life, it is well always to have writings

with him, as memory is one of the worldly things that may be counted uncertain. It is not to be trusted, for it is easily overcome by self-interest. With the house and one-half acre lot it is different. She has been in continual possession thereof since the sale, claiming it as her own, and has put valuable improvements thereon. It is true pa says he advised her not to do so, through fear that she might not be able to pay the purchase money. In the light of the evidence, pa cannot be believed unless he is corroborated. On this point he lacks corroboration. The boys were absent. Besides, he acknowledges, as heretofore shown, to having received the ninety-seven dollars and ten cents to be applied on his daughter's purchase. If pa is to continue preaching,—and it is to be hoped, for from the conduct of this suit and the testimony of the witnesses Eli is not the only one in need thereof,—he should cultivate a greater regard for the truth, and try to overcome his lust for the fleshpots of Egypt. It is bad advice that Stout sent to Eli to betake himself to a warmer country, and it is not wise for pa to take it. A rich man, who chose a home there once, sent back word, when he found the climate was sultry, the air impregnated with the fumes of brimstone burning, the society not select, and water scarce and more to be desired than the gold standard, that he longed for the companionship of poor Lazarus, to whom he had denied the crumbs that fell from his sumptuous table. He pleaded for a new trial and change of venue, which being refused, he asked that his brother be notified that the country was not a desirable place for a permanent location. Rather than accept Stout's advice, it had been better had he remained in jail until he mastered the Pilgrim's Progress, and learned how to get rid of the heavy loads which are preventing the full consecration of himself to his chosen calling, than which there is none higher. If he is going to despoil anybody, it should not be those of his own household. With them, at least, he should be just.

As to this one-half acre lot, pa must be held to be the holder of the legal title in trust for Clara. *Potts* v. *Fitch*, (W. Va.) 34 S. E. 959; *Camden* v. *Dewey*, *Id.* 911. The decree complained of must therefore be reversed, and this cause is remanded to the circuit court, with direction to

secure to Clara, the wife of Eli, the legal title to the one-half acre tract, retaining thereon a lien for any unpaid purchase money, if her pa exacts it, subject to the credit of ninety-seven dollars and ten cents, with interest and the costs of this suit, and any other just demand she may show herself entitled to, except the "bluff" money, which, if not really belonging to pa, coming from a corrupt source would pollute her otherwise chaste home. Reversed and remanded.

Reversed.

CHARLESTON.

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ROSENOUR *v.* ROSENOUR *et al.*

Submitted February 1, 1900—Decided March 24, 1900.

1. MARRIED WOMAN—*Oral Contract.*
An oral contract by a married woman for the sale of her land cannot be specifically enforced under the doctrine of part performance. (p. 558).

2. WRITTEN CONTRACT—*Acknowledgment—Performance.*
A written contract by a married woman for the sale of her land, unless living separate and apart from her husband, cannot be specifically enforced unless acknowledged by her before an officer authorized to take such acknowledgment. Her husband must join in the contract. (p. 558).

3. BILL—*Contract—Specific Performance—Decree.*
Where a bill in equity is filed alleging a contract for the sale of land, but admitting that the contract is so imperfect as not to be capable of specific performance, and asking repayment of purchase money and compensation for improvements, no decree of specific performance can be made on such bill without an amended bill seeking that relief. (p. 561).

Appeal from Circuit Court, Tucker County.

Bill by Mox Rosenour against Henry Rosenour and others. Decree for plaintiff, and defendants appeal.

Reversed.

A. B. PARSONS and L. HANSFORD, for appellants.

Jos. T. HOKE asd WM. G. CONLEY, for appellees.

BRANNON, JUDGE:

This is a bill in equity in the circuit court of Tucker County by Mox Rosenour against Henry Rosenour, Susan Rosenour, and James B. Reese. The bill states that Mox Rosenour is the son of Henry Rosenour, by a first wife, and that while she was living Henry Rosenour purchased a tract of land on Red creek, Randolph County, with means belonging partly to Mox Rosenour's mother, though the land was conveyed to Henry Rosenour, but that he always acknowledged a right in his wife to an interest in the land; that Henry Rosenour sold this land, and after the death of his first wife he told the plaintiff that he was entitled to receive out of the said sale five hundred dollars as his mother's share of the land; that some time after the sale of the farm the father married a second wife, Susan Rosenour; that later Henry Rosenour bought of Reese one hundred and eighty-eight acres of land in Tucker County, that Henry Rosenour paid all the purchase money for this land, and that Susan Rosenour paid no part of it, because she had no funds to do so; that said Tucker County land was paid for out of money arising from the sale of the farm in Randolph County, in which Mox Rosenour claimed said five hundred dollars interest; that a few days after Henry Rosenour purchased the one hundred and eighty-eight acres in Tucker County, he sold by written contract, dated 10th March, 1893, one hundred acres of said one hundred and eighty-eight acres to Mox Rosenour; that the plaintiff, Mox Rosenour, is illiterate and unable to read, and that he supposed the writing was a complete contract for the sale of the one hundred acres, and that the land would be paid for out of the five hundred dollars due the plaintiff from the sale of the Randolph farm, but that the plaintiff had learned that said written contract was so ambiguous

that he could not enforce the same by specific performance; that, relying, however, on that written contract and the representation of his father that he would convey to him (the said Mox Rosenour) said one hundred acres, and pay for it out of money due him from his mother's estate in the hands of his father, the plaintiff had taken possession of the one hundred acres, which was unimproved, claiming title thereto under said contract, and had built a house thereon as a family home, and cleared and fenced and otherwise improved eleven acres, costing him five hundred and seven dollars; that Bowman, a surveyor, was employed to survey the one hundred acres, and had made a plat thereof, giving boundaries; that after he had so improved said one hundred acres, and lived upon it for three years, and after his father had collected the money from the plaintiff's mother's estate in Randolph County, said Henry and Susan Rosenour conspired to cheat and defraud the plaintiff out of his land and improvements, by having the one hundred and eighty-eight acres conveyed to Susan Rosenour from said Reese. The bill charged that the purchase of the one hundred and eighty-eight acres was in the name of Henry Rosenour, and that the deed was likewise, but that Henry Rosenour had changed the deed so as to make the conveyance to his wife, (Susan); that then Henry Rosenour repudiated his contract with the plaintiff, and refused to make the plaintiff a deed for said one hundred acres, or to pay him for his improvements thereon, and refused to pay any damages by reason of the breach of his contract and his fraud in having said deed made to his wife, by reason whereof the plaintiff claimed that he had suffered damages in the sum of seven hundred dollars. The bill alleged that Henry Rosenour was insolvent; that said deed to Susan Rosenour was not on record, and, so far as appears, the legal title was yet in Reese; that at the request of Henry Rosenour, Reese had changed the name in the written contract of purchase of the one hundred and eighty-eight acres from Reese, and also in the said deed, by rubbing out the name "Henry," and inserting in its place the name "Susan;" and that the deed was withheld from recordation to defraud the plaintiff and other creditors. The bill prayed, as specific relief, that the court as-

certain the value of improvements put upon the land by Mox Rosenour and the amount of damages sustained by him by reason of the breach of said contract; that a decree for the same, and also for the five hundred dollars due from his mother's estate, be entered against Henry Rosenour; that the deed from Reese to Susan Rosenour be held fraudulent as to the plaintiff's demand; and that the one hundred and eighty-eight acres be charged with the same, and sold for payment thereof. The bill also contained a prayer for general relief. Henry and Susan Rosenour answered, denying in toto the material elements of the plaintiff's case. Susan Rosenour demurred to the bill, specifying as grounds that the contract of sale between Henry and Mox Rosenour is not valid, and that it is not such an instrument as can be specifically enforced; because the demand is not such as can be enforced against land of Rosenour; and because the property sought to be charged is her separate property, and never the property of Henry Rosenour. The court entered a decree compelling Susan and Henry Rosenour to execute to Mox Rosenour a deed for the land, from which deecree Susan Rosenour appealed.

As a very unique specimen of drafting,—a legal curiosity,—as well to show that it is so uncertain and imperfect as to forbid a decree of specific performance, the written contract is here inserted:

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Mox Rosenou
Samp Pennington
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The stars represent words indistinct in the folds of the paper, which the clerk could not make out and copy.

This paper denies the statement of the bill that it was signed. Henry Rosenour's signature does not appear. It is not pretended that Susan Rosenour signed it. Its execution is not proven. The subscribing witnesses deny it,—know nothing about its execution. Such as it is, it is false under the evidence; but, if genuine, it is a simple nullity, so far as specific execution is concerned, because a contract which a court of equity will specifically enforce must be certain as to the description of the property, and the uncertainty of this instrument is such that it cannot be removed by extrinsic evidence. *Mathews* v. *Jarrett*, 20 W. Va. 415; *Westfall* v. *Cottrill*, 24 W. Va. 763. There is no basis for extrinsic evidence under this contract. However, the bill does not proceed for relief on this writing. It admits that it does not call for specific performance.

Can the decree be vindicated on the theory of an oral contract? What oral contract? Is it that represented by that written contract? If so, where is the description of the land? If you want to say that you will convert this abortive written contract into an oral one, you cannot do so, because you cannot use it to prove any contract. You must have something else to define the land. An oral contract must have fully the same certainty, or capacity of being given certainty by oral evidence, as a written contract. *Gallagher* v. *Gallagher*, 31 W. Va. 9, (5 S. E. 297). If we say that after this contract Henry Rosenour sent a surveyor to the land, and had him to survey out this one hundred acres, and give it metes and bounds, which it never had till then, though the alleged contract had been made long before, the answer is that Mox Rosenour never took possession under a contract supposed to date from that survey, because he was already in possession, and in order to warrant specific performance of an oral contract for the sale of land there must be actual possession taken under it,—a possession attributable alone to that contract, not mere continuance of possession under some antecedent right. We cannot say that survey gave definiteness to the written contract, because that survey was made after that contract. It was not a part of that contract. Oral contracts are not specifically executed unless the evidence shows an agreement definite in terms, definite in the de-

scription of the land, and that evidence is clear and not conflicting. The evidence in this case is seriously conflicting. *Gallagher* v. *Gallagher*, *supra*. This case is a notable instance of the danger and uncertainty of decreeing performance of oral contracts,—the evidence frail, unconvincing, hard to understand, and very conflicting. The statute of frauds requires a writing to take people's land from them under the theory of a sale. Unfortunately, as I think, and the declarations of many illustrious judges confirm it, courts of equity, moved by a motive to defeat fraud, have introduced what is called the "doctrine of part performance;" but the courts have many times seemed to regret this repeal or nullification of the statute of frauds, and have been emphatic to say that the doctrine has been carried too far, and should go no further, and that a very plain case should be made to warrant its application. These declarations will warrant a court in demanding full, clear, and unconflicting evidence. I should have said above, as to the matter of certainty of description of the land that the case of *Crim* v. *England*, 46 W. Va. 480, (33 S. E. 310), cannot help the plaintiff; for there the Court would have held the contract too vague in decription for specific land, and only sustained it because it was a sale of a moiety, which required no further description.

Perhaps the circuit court rested its decree on the theory that the contract and deed for the one hundred and eighty-eight acres of land were in the name of Henry Rosenour, and were then changed to the name of his wife. This is hardly material, as there was no enforceable contract. Under this point the evidence of S. R. Blackman, who acted as agent for Reese in the sale of the land, is satisfactory and conclusive. He says that Henry Rosenour came to him to buy the land, and they agreed; that he drew a contract of sale in the name of Henry Rosenour as purchaser, as he could not well understand Henry Rosenour, who was an immigrant from Europe, but Rosenour kept shaking his head and saying it was not right; and that he then asked Mox Rosenour, and Mox said it was "Susan," and Blackman did not know who she was, and Mox said she was his father's wife. Blackman says that Mox said the land was to be in her name, as she owned the property that was to

pay for it, and thereupon Blackman said that it would be all right if the contract should be in her name. Blackman says the first contract was in her name, and he told Henry Rosenour that he would make the change, and that Henry Rosenour seemed satisfied, and paid one hundred dollars, and Blackman gave him a receipt in Susan Rosenour's name, and that receipt is filed. It is not sure, from Blackman's evidence, whether what is called the first contract was delivered and brought back shortly thereafter, or whether the first contract was even signed, but he says that at the very time when that first contract was drawn it was understood to be wrong, and as the receipt for the one hundred dollars bears the same date, I would conclude that it was not delivered and then brought back. Be this as it may, Blackman is distinct in saying that Henry Rosenour was dissatisfied, and that he (Blackman) agreed to change it before any money was paid, and thus the true contract was a purchase in the name of Susan Rosenour. Blackman says that the true contract is filed in this case, and that is in Susan Rosenour's name. Blackman says that he directed Reese to make a deed under the contract. Reese lived elsewhere. He sent a deed in the name of Henry Rosenour. Blackman, having in his possession the deed for delivery, informed Reese of the mistake, and Reese authorized him to change it to the name of Susan Rosenour, which he did before delivery. Thus it seems reasonably clear, from disinterested testimony, that contract and deed were in the name of Susan Rosenour, and not put to her name fraudulently and, what is more, it is clear from Blackman's testimony that Mox Rosenour knew that the contract was in her name, was present when the mistake in the draft was corrected, and helped in its correction. Therefore, when he made the alleged contract with his father, he knew his father did not own the land. If he went on that land, and expended labor thereupon, he did so with full knowledge that his stepmother owned the land. He so stated to a disinterested witness (Blackman).

We have seen that the title papers vest in Susan Rosenour a separate estate in the land, if we can say there is, strictly speaking, a separate estate these days. She owned the land. The decree is erroneous, because it compels a

married woman to specifically execute what? A written contract? She signed none. An oral contract? Mox Rosenour puts no oral contract made by her into his bill. The bill does not go upon that theory, either as to Henry Rosenour or Susan Rosenour. Most certainly it states no oral contract with her. The only contract it pleads is one with Henry Rosenour. Moreover, Mox Rosenour not only does not state in his bill any contract, written or oral, with Susan Rosenour, but, on the contrary, states as a witness that he had no contract with her. But, if he had an oral contract with her ever so clear and certain, it could not be enforced against her, because she is a married woman. Even a written contract, if not acknowledged by her, cannot be enforced; much less an oral one. *Moore* v. *Ligon*, 22 W. Va. 292; *Id.* 30 W. Va. 146, (3 S. E. 572). The reason is that at common law a married woman could not dispose of her land. She can now only do so so far as statute law enables her to do so; and only in the precise mode in which the statute authorizes her to do so. Formerly, under Code 1868, chapter 73, section 6, she could only pass her estate by privy examination, acknowledgment, and declaration, as provided in that chapter, and the writing effecting a sale or conveyance had no operation until such privy examination was recorded. So that section read. Acts 1891, chapter 23, made a change to an extent. That chapter of the Code, as amended by that act, is found in Code 1891, chapter 73. That act dispenses with a privy examination and declaration that the *feme* willingly signed the writing and does not wish to retract it, but it did not dispense with an acknowledgment by her; and note that the amended section 6, while it dispenses with recordation as a prerequisite to the operation of the instrument, yet it does require still that the instrument must be acknowledged before an officer by the married woman. She cannot sell or convey her realty by any oral contract. She cannot do so by any writing, except by one in which her husband unites (Acts 1893, chapter 3, section 3), and acknowledged by her as required by chapter 73. It is argued in this case that said act of 1893 changed this doctrine, because it took away her common-law disability. It did not remove all of her disability, save that it enlarged her capacity to contract, and made

her amenable to the jurisdiction of a common law court for the enforcement of her contracts, as she never had been until that act of 1893; yet that act does not touch that particular contract of a married woman by which she sells or conveys her real estate. That is governed by chapter 73, section 6. *Williamson* v. *Cline*, 40 W. Va. 194, (20 S. E. 917), has no application to the case.

But I suppose that the claim is that this doctrine, just spoken of, does not apply in this case because the one hundred and eighty-eight acres was purchased with the means of Henry Rosenour in fact, and therefore the land is to be regarded as his, though in the name of his wife. Blackman says that the purchase money, except one hundred dollars, was paid by an order to him given by Susan Rosenour on L. D. Strader, to be paid out of a judgment against Sampson Snyder. Thus she paid for it. But it is claimed that the means to pay for the land came from the sale of a farm on Red creek, in Randolph County, which Henry Rosenour purchased of Jacob Roy, and that in its purchase he used some money of the first wife of Henry Rosenour, to the extent of five hundred dollars, and that when she died Henry Rosenour acknowledged an interest in the land in Mox Rosenour, and when it was sold Henry Rosenour promised Mox Rosenour five hundred dollars out of its sale, and therefore he was entitled to that interest in the Tucker County land. I do not think that this is anything but a personal debt, if Mox Rosenour's version is true; but it is contradicted. The evidence of any such promise by Henry Rosenour is under very conflicting evidence. But, as to the claim that money of Mox Rosenour's mother was invested in the land, it is not proven. It is shown that in Europe she had no estate. Her husband was so poor, and she, too, that when he crossed the ocean she was unable to come, and not until he worked at Wheeling did he have means to bring her to him. It is proven that she was unable to invest five hundred dollars in this land. Her husband was an industrious, laborious man, who worked hard, and earned money at Wheeling; so that it is plausible to say he had means to buy the little Randolph farm, and wholly unplausible to say that she had any means to invest. It is not proven that she ever set up any claim. It

is proven that her sickness entailed upon her husband considerable debt; but more unfortunate to him still, as regards indebtedness, was the waywardness and irregular conduct of his son, Mox, bringing upon his father expense and distress. It is not necessary to specify his acts of waywardness. I refrain from so doing; but they serve to render his cause unmeritorious, and inspire the conviction that his cause is trumped up.

That Randolph farm was conveyed in July, 1892, by Henry Rosenour to his wife, Susan; so that it was her land when sold. This, perhaps, was to avoid a creditor as to a small debt; but that is not material now. If Mox Rosenour had no money in it, he could not complain of his father giving it to Susan Rosenour. She says that, when he married her, she had separate estate from her father, and it is proven that she had some; and she says that she devoted it to paying her husband's debts, and fully paid for the land. Suppose that is not so; if Mox Rosenour was not a creditor, he can lift no voice about the transaction. He can make no protest as to this conveyance. Nor can he, for the same reason, make any objection to his father settling the Tucker tract on Susan Rosenour. And then Mox Rosenour's claims are inconsistent. In his bill he predicates his claim upon the theory that his mother's money went into the Randolph land, not saying that his own money went into it; but in his evidence he says he worked at Wheeling along with his father, and made five hundred dollars, which he put into a savings bank, and that his father took this and put it in the Randolph land. Thus he has two sources—inconsistent sources—or claim for five hundred dollars in that land. Why did he not bring evidence of deposit in that bank? If he earned the money, it was his father's because Mox was an infant. It could constitute no debt, even if, after his father used it, he promised to pay Mox, as the promise would be without valid consideration. But the evidence is utterly conflicting as to that promise. It is not satisfactorily proven.

Mox Rosenour has abandoned the possession of the land. Why? Because he knew he had no just claim to it. When he left it, he declared he would never return. He changed his mind under some influence, and brought this suit; but

his leaving is a circumstance against him, as he would not have done so if strongly impressed with the justice of his claim. What has he lost? He poorly cleared about six acres, and built a little log house; but he lived on the land four years, and took four crops from it. His father did a great deal of the work on the house. Susan Rosenour paid some cash for the carpenter work on it, we know. She files and swears to an account against Mox for cash, and cash paid for fruit trees, roofing paper, nails, oats, plow, etc., amounting to more than three hundred and twenty-five dollars. This is her version under oath, and her husband corroborates her largely; so that, in this family quarrel and cross swearing, a court would hardly know what was the equity of the mere money account between the parties,—what the old people did for Mox Rosenour. But, judging him by the circumstances disclosed by the record, it is highly probable that he received all he was entitled to, if he could be said to have any legal claim, further than mere relationship, which cannot be said.

There is another objection to the decree, which I have concluded would reverse it. The bill confesses that the written contract of sale is so imperfect that the plaintiff is not entitled to specific performance of it, and, waiving such relief, goes entirely for money recovery for improvements and damages; but the decree is, not for such money recovery, but for specific performance. No prayer of the bill asks specific performance. I am aware of the well-known rule, stated in *Shoe Co.* v. *Haught*, 41 W. Va. 275, (23 S. E. 553), (Syl., point 6), that, without prayer for a particular relief, that relief may be given under the prayer for general relief, provided the relief asked is not inconsistent with the specific relief asked. In this case it is inconsistent. The bill asked for a money recovery, on the theory that there was no enforceable contract. The decree of relief can rest alone on the antagonistic theory: that is, that there was an enforceable contract. There is no other contract pleaded in the bill than that imperfect written contract, no contract save that attempted by it, and the bill waives relief on that contract. Therefore, we may say the bill states no contract at all as the basis for a decree of specific performance, and proceeds on the claim that there

was no such valid contract enforceable in equity and asks money compensation on the theory that the contract was abortive and not capable of enforcement. It is an elementary principle that matters not charged in the bill cannot be considered on the hearing, and no decree based thereon can be entered, though ever so fully proven. *Burley* v. *Weller*, 14 W. Va. 264. Now, such a decree works a surprise on the defendant. Perhaps not so much in this case, in fact; but it will not do to adopt such a precedent of framing the case on one theory and taking a decree on another inconsistent theory. I have no doubt that if the plaintiff changed his mind, and concluded that he was entitled to specific performance, he could amend his bill, as the matter would be sufficiently germane to the case to allow such amendment; but specific performance cannot in this case be decreed, except by the amendment of the bill. *Bird* v. *Stout*, 40 W. Va. 43, (20 S. E. 852). But "under the prayer for general relief the plaintiff cannot recover on a claim distinct from that demanded or put in issue by his bill." *Piercy* v. *Beckett*, 15 W. Va. 444. Where a party files a bill for specific performance, and it appears that he cannot have it, but is entitled to a rescission of the contract, and a recovery of money consequent thereon, in order to get a decree of rescission, instead of specific performance, he is compelled to amend his bill under several Virginia decisions. *Parrill* v. *McKinley*, 9 Grat. 1; *Belton* v. *Apperson*, 26 Grat. 217; *Ferry* v. *Clark*, 77 Va. 397. In *Anthony* v. *Lettwich's Representatives*, 3 Rand. (Va.) 238, the bill was for specific execution, but the court was of opinion, on the pleadings and evidence, that it was not a case for specific performance, but allowed an amended bill to claim compensation for improvements put on the land by the purchaser, just as in this case.

Being of opinion that the plaintiff is entitled to no relief, we reverse the decree and dismiss the bill.

Reversed.

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CHARLESTON.

KNOTTS *et al.* *v.* MCGREGOR.

Submitted February 5, 1900—Decided March 24, 1900.

1. EXECUTOR—*Action—Testator.*
   An action can be maintained against an executor for breech of covenant of a lease committed by his testator. (pp. 569-570).

2. OIL-LEASE—*Covenant.*
   In a lease for oil and gas there is an implied covenant of right of entry and quiet enjoyment for the purposes of the lease. (p 571).

3. DOUBLE-LEASE—*Covenant.*
   The covenant of quiet enjoyment in a lease for oil or gas, or other purposes, is not broken by the mere fact, alone, that the lessor makes another lease during the term, of the same premises, whether the first lessee be in actual posession or not; the second lessee not entering. (p. 571).

4. COVENANT BROKEN—*Possession.*
   The covenant for quiet enjoyment implied in a lease for oil is broken by the exclusion by the lessor of the lessee from taking possession for the purposes of the lease, or his withholding from him the possession of the land for the purposes of the lease. (p. 572).

5. MISJOINDER—*Actions—Decedent—Fiduciary.*
   A cause of action against a decedent's estate cannot be joined in the same action with a cause of action against the personal representative ability. (p. 573).

6. MISJOINDER—*Demurrer*
   A misjoinder of causes of action in a declaration is fatal on demurrer, dismissing the action, unless the plaintiff, as he may, amends by striking out one or more counts, or, if two cause of action or two assignments of breaches of contract are in the same count, by electing to proceed only on certain causes of action of assignment. (p. 574).

Error to Circuit Court, Ritchie County.

Action by Knotts & Garber against Matilda McGregor. Judgment for defendant, and plaintiffs brings error.

Affirmed.

V. B ARCHER, for plaintiffs in error.

B. F. AYERS and W. McG. HALL, for defendant in error

BRANNON, JUDGE:

A. W. Knotts and J. Garber brought an action of covenant against Matilda McGregor, executrix of the will of David McGregor, deceased, in the circuit court of Ritchie County, which action was dismissed upon a demurrer to the declaration, and the plaintiffs have brought the case to this Court. The declaration avers: That David McGregor made a lease, August 30, 1889, to Knotts & Garber, of certain land, for the purpose and with the exclusive right of operating for the development of petroleum oil and gas for the term of five years; said lessees covenanting to pay McGregor an eighth of the oil produced, and two hundred dollars per annum, for each productive gas well, and that said lessees should complete a well within one year from the date of the lease, and a failure to do so should render the lease null and void. But it was further covenanted that, if the lessees should pay McGregor a rental of twenty-five cents per acre from the time specified for the completion of the well, such payment should operate to extend the time for five years, and that said rental should be deposited to McGregor's credit in the Second National Bank of Parkersburg. That said lease provided that all the conditions thereof should extend to the heirs, executors, and administrators of the parties. The declaration further avers that the plaintiffs had well and truly kept and performed their part of the said lease; that on August 30, 1890, they tendered McGregor one hundred and twenty-five dollars for the rental provided in said lease, but he refused to accept the same, and that on August 29, 1891, the plaintiffs deposited the same to McGregor's credit in said bank, and that McGregor had accepted such deposit and used part of it in his lifetime, and his executrix had accepted and used the residue thereof; that, the plaintiffs having kept their covenants, the said McGregor did not in his lifetime keep his, and the plaintiffs did not during the term of said lease have and enjoy the exclusive right to drill and operate for oil and gas on the premises demised; that after the making of said lease, and during the term therein

granted, David McGregor executed another lease, February 13, 1890, to A. L. Gracey, for the same land, with the exclusive right to operate for oil and gas thereon for the term of twenty years from the date of said lease,—requiring said Gracey to complete a well within nine months, or forfeit the lease, with right, however, to keep the lease alive by the payment of twenty-five dollars per month rental. The declaration further avers that David McGregor died during the term so demised to the plaintiffs, and that Matilda McGregor was appointed by his will its executrix, and qualified as such. The declaration further avers that, before the expiration of the one year specified in said lease in which said plaintiffs were entitled to enter upon the leased premises to operate for oil, McGregor did prevent and exclude them from their right so to enter upon said premises, and continued so to exclude them up to his death, September 7, 1891, and prevented them from entering upon said premises for the purposes of putting down the test well or developing said premises for oil within the first year mentioned in said lease, and also within the five year period therein mentioned, and that the plaintiffs were kept and held out of the exclusive enjoyment of the right to operate upon said premises for oil from the 30th of August, 1889, until the death of said McGregor, and thereby the plaintiffs lost the benefit of the demised premises, and gains and profits which they would have made from said lease, and the value of said lease, and had thus been damaged one hundred and fifty thousand dollars. The declaration contained a second count, stating over again the same lease from David McGregor to the plaintiffs, and the subsequent lease by him to Gracey, and alleging the denial to the plaintiffs of the benefit of their said lease, and their exclusion from the premises by McGregor in his lifetime, in like manner as stated in the first count. This second count further averred that after the death of David McGregor his said executrix entered into and held said land as such executrix, and that on February 10, 1895, she executed to James Gartland a lease for the purpose of the production of oil and gas for the period of five years, covering one hundred and twenty-five acres of the same land which had been leased by David McGregor

to the plaintiffs, that the said Matilda McGregor, executrix, did cause said Gartland to enter and take possession of said one hundred and twenty-five acres, and that he did by virtue of his lease enter into said premises, and exclude the plaintiffs from the said one hundred and twenty-five acres, within the period of their lease; and that said executrix did cause and permit Gartland to operate for oil on said land, and to put down a well thereon, and thereby did exclude the plaintiffs from the possession of said premises, and thus did disturb and molest the plaintiffs, and deprive them of the benefit, enjoyment, and profits of their said lease.

It is contended that no action at law lies for a breach of the covenant of the plaintiffs' lease by David McGregor, in his lifetime, against his personal representative. For this position we are referred to Code chapter 86, section 6, providing that an heir or devisee may be sued in equity by any creditor to whom a debt is due, for which the estate descended or devised is liable, or for which the heir or devisee is liable in respect to such estate, and he shall not be liable to an action at law therefor. We are also cited for the proposition to *Rex* v. *Creel*, 22 W. Va. 373. That statute has no bearing on this case. It does not bear on the liability of the personal estate. Formerly the land of a decedent, in the hands of his heirs, was liable only for debts of record, and bonds or other instruments under seal, expressly binding the heirs. For such debts the heir could be sued at law, and the debt levied out of land descended to him. Such a debt bound the land, but the land was not bound for any other debts at law, though it was in equity. The specialty creditor getting a judgment against the heir had preference over other creditors. The legislature thought it unjust that a dead man's land should be liable only for part of his debts, and concluded to make it liable for all his debts, whether by bond or otherwise. This statute is found in Code, chapter 86, section 3. Having thus made the decedent's real estate liable for all his debts and demands, it was thought best to prohibit different and multitudinous suits at law against the different heirs, entailing large costs, and to compel the creditors to resort only to equity, where the land assets could be adminis-

tered for the benefit of all creditors, and the debts marshaled, and all paid, according to the principle on which courts of equity, before that statute, marshaled equitable assets. It is apparent that the legislature did not intend to abolish the long-standing remedy of a creditor to sue a personal representative to have his demand satisfied out of the personal assets. Section 19 of chapter 85 of the Code expressly provides that "a personal representative may sue or be sued upon any judgment for or against, or any contract of, or with his decedent." This section only declares what the law was before it, and surely meets and defeats the contention that section 6 of chapter 86 does not allow a suit against the personal representative. 2 Lomax, Dig. p. 116, § 13. Of course, as we see daily, actions at law can be brought against personal representatives on bonds and notes of the decedent under section 19, chapter 85; but actions at law could not now be brought on a bond against the heir, as formerly, because section 6, chapter 86, would prohibit it. If it be thought that an action for breach of covenant contained in a deed of lease for years or in fee simple cannot be maintained against a personal representative, the position cannot be maintained. It is a contract, under the wide language of section 19, chapter 85. "An action of covenant respecting real estate will lie against executors, though not expressly bound." *Harrison* v. *Sampson*, 2 Wash. (Va). 155. A covenant of warranty of title is a personal covenant, upon which an action of covenant lies on eviction against the personal representative. *Tabb's Adm'r* v. *Binford*, 4 Leigh 132. An action at law against a personal representative of a decedent, to secure satisfaction out of his personal assets, may be sustained, under section 19, chapter 85, Code, on any personal promise, covenant, or obligation,—any contract. I did not suppose there was any question about this. The creditor, if he thinks there is any question about securing satisfaction out of the personal assets in the hands of the personal representative, may, without first suing at law, go into equity, under Code, chapter 86, section 6. As a judgment at law is no evidence whatever of indebtedness against the heir,—I mean, a judgment against the personal representative,—if there is any doubt of the sufficiency of

the personal assets to pay debts resort had better be had at once to equity.

Does the plaintiffs' declaration show a cause of action to charge the estate of David McGregor with damages as for the breach of the covenant contained in the deed of lease? Every lease for years, though it does not expressly covenant for quiet enjoyment of the premises by the lessee, implies and imports such covenant; that is, that he shall enter and enjoy the premises for the term without the permission of any one. Wood, Landl. & Ten. 562; Tayl. Landl. & Ten. § 304. Does the declaration show a breach of such covenant?

First, does the first assignment of breach in count one, namely, the execution by McGregor of the second lease to Gracey, *per se* and alone, operate as a breach of the covenant? Counsel for the plaintiffs cite 11 Am. & Eng. Enc. Law (2d Ed.) p. 469, reading: "A tenant is evicted where, before the expiration of his lease, the landlord rents the demised premises to another person, who takes possession of them without the tenant's consent." That is sound law, as the law found in that great work almost invariably is; but note that it does not assert the proposition asserted in the declaration (that is, that the mere execution of a second lease alone is eviction), but it requires, in addition, the taking of possession of the premises by the second lessee, which is necessarily an exclusion of the first lessee. In order to constitute a breach of warranty in the case of landlord and tenant, there must be an actual eviction from the premises. 1 Tayl. Landl. & Ten. §§ 377, 378, 381. . "An actual eviction is an actual expulsion of the tenant out of all or some part of the demised premises,—a physical ouster or dispossession from the very thing granted, or some substantial part thereof." 11 Am. & Eng. Enc. Law (2d Ed.) p. 459; 2 Minor, Inst. 757; *Briggs* v. *Hall*, 4 Leign 484. In this case the declaration does not predicate the cause of action upon the theory that the plaintiffs were once in possession, and were expelled by McGregor or by Gracey; but I give the authorities just quoted to show what must be the character of act constituting eviction, to reflect light by assimilation on this case. Further, that second lease, so far as the declaration

shows, did not constitute paramount title. If at the time a conveyance with general warranty is made the land is actually in the possession of a third party, holding the same under paramount title, this amounts to an eviction *eo instanti*. Before an action will lie for a breach of covenant of general warranty, there must be an ouster under paramount title, but it may be established by showing that at the time the covenant was made a third person was in possession of the land under paramount title. *Rex* v. *Creel*, 22 W. Va. 373. But that second lease does not appear to constitute paramount title, as far as the declaration goes; and, if it did, there is no pretense that Gracey took possession under it. In fact, the declaration says he did not. The most that can be said, therefore, is, so far as this second lease operates, that McGregor failed to deliver possession, and it seems that that is not eviction, or tantamount thereto; and while, under the circumstances, the failure of the owner to deliver possession to a lessee might be the basis of an action, if he refused on request, it is not eviction. 11 Am. & Eng. Enc. Law (2d Ed.) 460. Thus, the mere making of that second lease constitutes no ground of action.

Next, as to the other breach assigned in count No. 1. That is that David McGregor denied the plaintiffs the right to enter upon the premises to operate for oil, and did exclude them from so doing. When one makes a lease to another, he impliedly covenants that the lessee shall enter into the possession, and quietly enjoy that possession. It implies that the demised premises shall be open to entry by the lessee at the time fixed for taking possession. *King* v. *Reynolds*, 42 Am. Rep. 107. Reason and justice say that, if the lessor refuse to admit the lessee into possession,—if he withhold possession from him,—he violates his covenant. Authority sustains this position. 11 Am. & Eng. Enc. Law (2d Ed.) 467; 1 Tayl. Landl. & Ten. § 306; *Hubble* v. *Cole*, (Va.) (13 S. E. 441), 13 L.R. A. 311. Now, the only question perplexing me in this particular case is whether the declaration is too general in its charge of the exclusion of the plaintiffs by McGregor from the premises. It does not say how or by what means he excluded them. It does not say that they requested

delivery of possession, but they need not request, as the lease gave them right to possession. The declaration does not, in terms, say that the plaintiffs went to take possession; but in effect it does so, by charging that McGregor denied their right to possession, and excluded them from going on the premises to bore the test well. A declaration need not give items of evidence,—mere evidential facts going to show the ultimate fact constituting the gravamen of action. It need only give the facts that constitute the cause of action to be shown by the evidence. I conclude that the declaration is sufficient in this respect.

But there is another grave objection to the declaration, for which we must sustain the decision of the circuit court. In the same action the plaintiffs join two separate causes of action,—one against the executrix for breach of covenant by the testator in his lifetime, and the other for a breach by the executrix after his death. Of course, McGregor's estate cannot be liable for the act of the executrix in making the lease to Gartland, for three reasons: (1) Because, as shown above as to the Gracey lease, a mere second lease would not be a breach of the covenant; (2) because that lease was made after McGregor's death; (3) Because it is to be presumed that the land descended to the heirs, and that the executrix had nothing to do with it under the will, it not being so averred. And, as to the averment that the executrix excluded the plaintiffs from the enjoyment of the lease to them, the estate is not liable, for two reasons: (1) Because it is not shown that she had any lawful authority over the land; (2) because, if she did wrong in refusing the plaintiffs possession under the lease made by her testator, it would be her own wrong, for which she would be personally liable. "In causes of action wholly accruing after the decedent's death, the personal representative is, in general, liable individually." Schouler, Ex'rs. § 397; Lomax, Ex'rs. 262, §§ 14, 283. In this action there is a misjoiner of causes of action. For the cause of action originating from David McGregor's act in his lifetime, his estate would be liable. For those of Matilda McGregor, she would be individually liable. The one recovery would be payable out of assets; the other, out of her own individual property. "Claims as executor

cannot be joined with those accruing by private right, for the judgment against a party in his personal capacity is *de bonis propriis*, while against him as executor or administrator it is *de bonis testatoris*." 1 Bart. Law Prac. 304; 1 Enc. Pl. & Prac. 177. At page 163 the latter valuable work has an excellent discussion of joinder of causes of action. At common law an improper joinder in the same declaration of different causes of action was fatal on demurrer, working the dismissal of the action. It is still so on demurrer. Code, chapter 125, section 29, does not save such a declaration on demurrer. Prof. Minor says that, if there be no demurrer, the defect does not avail to arrest judgment, by reason of section 3, chapter 134, Code. No doubt that in the trial court a party may amend his declaration by electing which cause of action he will proceed upon, or by striking out particular counts, if the causes of action are stated in different counts. Where, as in the second count of this case, two causes are joined in one count, the party could cure by electing to proceed on a particular cause, but in this case the plaintiffs declined to amend. See 1 Chit. Pl. 228; 4 Minor, Inst. 448; *Creel* v. *Brown*, 1 Rob. 265.

The point is made that *Trees* v. *Oil Co.* (W. Va.; decided November 28, 1899) 34 S. E. 983, holds that an executory oil lease is terminated by the death of the lessor. Surely this Court did not mean to hold, and did not hold, that broad proposition. Under the peculiar feature of the lease in that case, as put in the first point of the syllabus,—not binding the lessee to carry out its covenants, but giving him right to defeat the same at any time without payment of anything,—that lease was held to be a lease, or option for a lease, at will, determinable by either party any time, as it created no vested estate. The lessee did nothing, and paid nothing. But in this case the lease does not contain that express clause of complete exemption from liability; and, moreover, under its terms the lessee tendered the rental within time, and on refusal paid it into bank to McGregor's credit, and he accepted it, as the declaration alleges. This is a different case from that. Therefore we affirm the judgment, without prejudice to any other proceeding in law or equity.

Affirmed.

CHARLESTON.

KOEN v. KERNS *et al.*

Submitted January 30, 1900—Decided March 24, 1900.

1. DEED—*Mistake—Evidence—Reasonable Doubt.*
In a suit to reform a deed for mistake, the evidence of such mistake must be clear, convincing, free from reasonable doubt, and not conflicting. The deed is presumed to be correct until it is shown by such evidence to be incorrect. (p. 578).

2. DEED—*Executory Contract—Variance—Mistake.*
If a deed made under a prior executory contract varies therefrom, it is presumed that the deed, so far as it departs from such contract, represents a change agreed upon by the parties from the terms of the prior contract, and the deed represents the final contract of the parties, and such contract and all antecedent propositions, negotiations, and parol interlocutions on the same subject are merged in the deed. It may, however, be shown that such variance is due to a mistake in drawing the deed by such evidence as the law in such case requires. (pp. 579-580).

Appeal from Circuit Court, Marion County.

Bill by Oliver N. Koen against Elijah Kerns and others. Decree for defendants, and plaintiff appeals.

Affirmed.

U. N. ARNETT, JR., R. F. FLEMING and A. B. FLEMING, for appellant.

W. S. MEREDITH, for appellees.

BRANNON, JUDGE:

Kerns leased to Nay, by lease dated September 19, 1892, a tract of seventy-five acres of land in Marion County for development of oil. This lease was assigned by Nay to Koen, and by Koen to the South Penn Oil Company. Said lease reserved to Kerns a royalty of one-eighth of the oil which might be produced from the land. By a deed dated

September 28, 1892, Kerns sold to Koen one undivided moiety of the one-sixteenth part of all the oil underlying said land, and thus Koen would get by this deed one-fourth of the one-eighth royalty reserved by Kerns in said lease; that is, one thirty-second part of all the oil produced on the land. Afterwards on May 28, 1895, Kerns sold, by deed, to Bartlett, one undivided moiety of the one-sixteenth of the oil in said land, Bartlett thus getting one thirty-second part of all the oil. By deed dated June 5, 1895, Bartlett conveyed to Hayden one-half of the oil which Kerns had conveyed to Bartlett, Hayden thus owning one sixty-fourth part of all the oil produced, and Bartlett a like share. Koen claims that a mistake was made in the deed of September 28, 1892, from Kerns to Koen, in this: That the contract was for the purchase of a moiety of Kern's one-eighth royalty, and not a moiety of a sixteenth; that the intent of Kerns was to sell and convey, and the intent of Koen was to purchase, not merely the half of a sixteenth, but a half of an eighth of the royalty. Koen says that Kerns had agreed to sell for two hundred and fifty dollars half of the one-eighth royalty owned by Kerns; that he had so agreed with Nay; that he (Koen) had agreed to purchase on that basis; that, accordingly, being informed by Nay of this agreement, a deed was prepared, to be executed by Kerns, which deed, as prepared, conveyed to Koen "the one undivided moiety of the one undivided eighth part of all the oil and gas produced and saved from and underlying the surface of a certain tract," etc.; that when the prepared deed, which was committed to Nay to have it executed, was taken into the country to Kerns' home for execution by Kerns, a question arose in the company there present as to the meaning of the word "moiety" in said deed, no one present seeming to know the meaning of that word; that Kerns on the occasion said that he had only sold Koen one-half of the royalty of one-eighth, which would be one-sixteenth of the oil under the land, and thereupon the word "eighth" in said deed as prepared was erased, and the word "sixteenth" inserted in place thereof; that all this was done under the belief by Kerns and the notary and every person present that the deed would convey to Koen one-half of the royalty reserved in

said lease; in other words, one-sixteenth of all the oil under said land. Koen claims further that, after said deed was so altered under such mistaken belief, Kerns executed it, and that he (Koen) was not present at its execution, and was not aware of the change made in it until long after its recordation; that the deed was brought to him; that he did not examine it; that no one informed him of the change made in the deed as drafted until long after it was recorded; and that he had accepted that deed, and placed it on record, under the belief that the deed conveyed to him half of said royalty, not a fourth of it, and under the belief that the deed had been executed as it was prepared. Koen, therefore, claims one thirty-second more of the oil than that deed gives him. This is the same thirty-second claimed by Bartlett and Hayden under the deed from Kerns to Bartlett dated May 28, 1895. Just here the parties clash. Koen claims that Bartlett and Hayden knew of this mistake, and conspired together to cheat and wrong him by obtaining from Kerns the deed to Bartlett of May 28, 1895, and that they obtained it with full notice of such mistake; and therefore the bill was filed by Koen in this case in the circuit court of Marion County to correct the alleged mistake in the deed of September 28, 1892, so as to make it convey to Koen one-sixteenth of the oil in said tract, instead of one thirty-second, and to annul the rights of said Bartlett and Hayden under the said deed from Kerns to Bartlett. The circuit court of Marion County dismissed Koen's bill, and he appealed the case to this Court.

The pivotal, crucial question in this case is, was there a mistake made in the execution of the deed from Kerns to Koen for a share of the oil? More closely, did Elijah Kerns intend to sell one-sixteenth of the oil, or one thirty-second thereof? Should the deed have conveyed a moiety of an eighth of the oil, or a moiety of a sixteenth? In the morning of the day, according to Nay's evidence, Nay asked Kerns if he had offered to sell his royalty, and Kerns replied that he did not know, and asked what he would give for it, to which Nay responded that he thought he could make him (Kerns) two hundred and fifty dollars out of it, and Kerns told him to sell it. This is the whole

preliminary contract. It is doubtful whether it was a final, binding contract. It is doubtful whether it had finality rendering it enforceable. At any rate, it was not in writing; not enforceable. What was sold, if it is considered a sale to Nay? If Nay was only authorized to sell, what was he authorized to sell? I mention this, not that I think it is conclusive in the case but only to show that the final deed cannot be reformed upon the theory that it departs from the preliminary contract; for I do not think there was such preliminary contract which the deed was bound to follow. The real question is does the deed convey what the grantor intended to convey, or does it by mistake convey only half of what it was intended and understood to convey? Upon this vital question the evidence of those present on the night of the day on which this preliminary talk between Nay and Kerns took place—the night when the deed was executed—gravely conflicts. Nay and his son say that when the word "eighth" was struck out, and it was intentionally struck out, they understood the deed to convey the one-sixteenth of the oil. This is not plausible, as the moiety of one-sixteenth could not be, to ever so plain a mind, a full sixteenth. It would import only a fraction of a sixteenth, even to one who could not fully comprehend the meaning of the word "moiety." Nay's son says that it was intended to strike out the word "moiety." That is not charged in the bill, the charge of the bill being simply that the word "eighth" was erased, and "sixteenth" put in its place, and that the parties did not know the legal effect of the deed thus altered, but thought it conveyed a sixteenth of all the oil; thus presenting the question of ignorance of law,—that is, ignorance of the legal effect of the deed. I do not discuss the question, so largely discussed in times gone by, of relief for mistake of law, or whether relief could be given in this case if such mistake as the bill asserts was actually existent. Witnesses for the defense pointedly deny this mistake. The two Duncans and Hays and the two Nays say that, when a question arose as to the meaning of the word "moiety," Kerns left it to his son-in-law Duncan to see whether the deed was right, Kerns being an unlettered, plain man of the great age of eighty years, utterly unable

to analyze or construe the deed; and the Duncans swear that J. W. Duncan said to his father-in-law that the deed was wrong as drawn, and that he ought not to sign it, and that he would not advise him to sign it, unless it should be changed from a moiety of the eighth to a moiety of the sixteenth; and his father-in-law said: "Now, John, see that it is changed. I have been took the advantage of so many times that I want to be sure;" and that thereupon the notary changed the deed, handed it to Duncan, and that he, seeing that the change was just as he directed, then said to the old man, "Grandpap, you can sign it now, if you want to." This seems probable, as the sons-in-law seemed to be averse to the old man selling away his chance for large returns from oil on his land. But the point I make just here is that the evidence gravely conflicts upon the vital point whether the parties misunderstood that deed when so changed. Nay and his son say they did. Duncan and his son say they did not, but that the change was made with set purpose to alter the effect of the deed from the conveyance of a moiety of an eighth to a moiety of a sixteenth. The old man had a right to make that change. No binding contract forbade it. In this conflict the evidence of the old man, if intelligible or decisive, would be of much import, because his purpose—his intention—is the vital question. His examination reveals that his great age disables him from giving a clear narration of the transaction. He does, however, plainly say that John Duncan said: "Grandpap, I would not sign that deed. It is not right. I would not sign it until it was fixed." And, after it was fixed, that Duncan told him he could do as he pleased, and that he thought the notary changed it, and that he left it to John Duncan to say when the deed was right. The evidence of the old man, while, in the whole, not clear, clearly corrborate the oaths of the Duncans when they say that the deed as drawn was unsatisfactory, and that it was purposely changed so as to convey just one-half of what it was drawn to convey. Now, here is conflict, open, unavoidable conflict, upon the turning point in the case,—a consideration which would forbid this Court, even in ordinary cases, from reversing the circuit court; but this is a peculiar case under the rules of law applicable to

it, and when we look at those rules they intensify the difficulty in the way of a reversal of a circuit court's decree. Let me advert to those rules. "A mistake in the execution of writing will not, in equity, be corrected, unless it appears that it does not contain the intention of the parties at the time it was made; and the proof of this, either parol, written, or both, must not be loose, equivocal, or contradictory, or in its texture open to reasonable doubt or opposing presumptions, for the writing itself is regarded as evidence so strong that only other unequivocal evidence irresistably conclusive is sufficient to reform it." *Jarrell* v. *Jarrell*, 27 W. Va. 743. Likewise, *Western Min. & Mfg. Co.* v. *Peytona Cannel Coal Co.*, 8 W. Va. 406, (Syl., point 7); *Pennebacker* v. *Laidley*, 33 W. Va. 624, (Syl., point 6); *Allen* v. *Yeater*, 17 W. Va. 128; *Maxwell Land Grant Case*, 121 U. S. 381, 7 Sup. Ct. 1015, 30 L. Ed. 949. I refer to *Southard* v. *Curley*, (N. Y. App.) 31 N. E. 330, 30 Am. St. Rep. 642, and note, 16 L. R. A. 561, as fully sustaining the doctrine here stated. "To justify the reformation of an instrument for mistake, it is necessary: First, that the mistake should be one of fact, not of law; second, that the mistake should be proved by clear and convincing evidence; third, that the mistake should be mutual and common to both parties to the instrument." *Purvines* v. *Harrison*, 1 Am. & Eng. Dec. Eq. 232; *Robinson* v. *Braiden*, 44 W. Va. 183, (28 S. E. 798).

Holding, as we do, that upon this conflict we cannot find that the mistake alleged existed, the case ends here logically; but I will add that another obstacle which the plaintiff must overcome is proof of notice on the part of Bartlett that he knew of the mistake alleged by the plaintiff to exist in the said deed. Here again the conflict of evidence is great. Such notice must be clearly proven. The circuit court has found the point against the plaintiff. Nay assented to the said change in the deed. If he was the purchaser, such assent would utterly preclude relief, unless it were proven that both he and Kerns thought the deed conveyed what it did not. Pom. Spec. Perf. Cont. § 241. If he bought for himself, it would preclude relief to him; if he bought as agent of Koen, it would bind Koen; or, at least it would not call for compulsion against Kerns, unless

we could find that the instrument did not do what he, too, intended to do. Merely because one's agent is mistaken, it does not follow that another, not likewise mistaken, can be compelled to do what he did not intend to do. In so far as the plaintiff relies upon a preliminary contract, and a departure of a deed from it, if there were such binding contract, there comes up the well-established rule of law that, whatever the departure of the deed finally executing the contract, it is presumed that the contract was changed by consent, and that the provisions of the deed were substituted purposely for the contract, and abrogate that contract, until it is clearly proven to the reverse. The law is that the deed reflects the final contract. It is not proven fully to the contrary in this case. *Railroad Co.* v. *Dunlop*, 86 Va. 346, 10 S. E. 239; Hil. Vend. 5; 1 Story Eq. Jur. § 160; *Bull* v. *Willard*, 9 Barb. 641; *Houghtaling* v. *Lewis*, 10 Johns. 298; *Jones* v. *Wood*, 16 Pa. St. 25; *Minor* v. *Edwards*, 12 Mo. 86; *Straley* v. *Perdue*, 33 W. Va. 375, (10 S. E. 780).

I omitted to say in its proper place that plaintiff claims that Bartlett had notice by record from the fact that in a certain other suit of Koen involving another interest in this oil land, to which Bartlett was a defendant, the bill alleged that Kerns had, by said deed, conveyed to him a sixteenth of the oil, and that this was notice to Bartlett that such was his right; but the answer to this is: First, that bill never hinted of any mistake in the deed, did not predicate Koen's ownership of a sixteenth on a mistake; and, second, while the bill did allege that Koen owned, under Kerns' conveyance, one-sixteenth, it averred that he derived it by the said deed, and said deed was exhibited with the bill; and that deed, when read, denied that statement of the bill, because it showed that it conveyed "the one undivided moiety of the one-sixteenth part of all the oil," etc. How could that be notice to anybody of a secret mistake in that deed? But, as I said above the case ends when we decide that the mistake is not proven with that distinctness required by law, but is involved in contradictory evidence, leaving the case, to say the least, in clouds of doubt, so that an appellate court cannot safely resolve that doubt by overturning the presumption that the circuit

court's decision is to be held correct until error clearly appear, especially in case of conflicting evidence. Therefore we affirm the decree.

Affirmed.

CHARLESTON.

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LOVINGS v. NORFOLK & W. RY. CO.

Submitted January 22, 1900—Decided March 31, 1900.

1. STATUTE UNCONSTITUTIONAL—*Jury of Six.*
   Section 169, chapter 50, of the Code of West Virginia, in so far only as it authorizes a jury of six men to try in the circuit court appeals from judgments of justices, is unconstitutional and void. (p. 591).

2. APPEAL—*Trial—Jury of Twelve.*
   On the trial of an appeal, in the circuit court, from the judgment of a justice, where the amount in controversy exceeds twenty dollars, if required by either party, a jury of twelve men shall be selected and impaneled to try the case in like manner as other juries are selected and impaneled in said court. (p. 586).

3. DAMAGES FOR WRONG—*Action—Contract.*
   In an action before a justice "in a civil action for the recovery of money due for damages for a wrong" by a passenger on a railroad train, whose ticket was wrongfully taken up by the conductor, and the passenger was afterwards called on by another conductor of the same train, then in charge, who demanded his ticket, and on his failure to produce a ticket and refusal to pay fare ejected him from the train, *held*, that the plaintiff could recover in said action whatever he showed himself entitled to recover in the action either *ex con tractu* or *ex delicto*. (p. 594).

Error to Circuit Court, McDowell County.

Action by Thomas Lovings against the Norfolk & Western Railway Company. Judgment for plaintiff. Defendant brings error.

Reversed.

JOHNSTON & HALE, W. H. STOKES and JAS. I. DORAN, for plaintiff in error.

JAMES A. STROTHER, RUCKER & KELLER and W. L. TAYLOR, for defendant in error.

MCWHORTER, PRESIDENT:

Thomas Lovings purchased from the agent of the Norfolk and Western Railway Company, on the 8th of November, 1897, a ticket for passage from Welch station to Kenova on said road, and boarded passenger train No. 3 on the night of that day, west bound, and took a seat in a coach on that train, and between Welch and Gray station the conductor of the train took up the ticket. At Gray the conductors were changed, and between stations Thacker and Matewan the second conductor called upon Lovings for his ticket, when he presented a slip, which he claimed the first conductor had given him when he took up the ticket, which the conductor refused to accept for passage to Kenova, and demanded his fare, in default of payment of which the conductor ejected him from the train. Lovings brought his action before a justice "for the recovery of money due for a wrong, in which the plaintiff will demand judgment for three hundred dollars." Plaintiff made his oral complaint in effect as stated above, which was entered on the justice's docket. The defendant entered a general denial, and, neither party requiring a jury, the justice, after hearing the evidence, entered judgment for plaintiff for three hundred dollars, and defendant appealed the case to the circuit court. On the 16th of March, 1898, on the calling of the case, both parties announcing their readiness for trial, the defendant, by its counsel, demanded a jury of twelve men to try the case, which was objected to by plaintiff, and the objection sustained, and the motion and demand were overruled and refused, and six jurors impaneled and sworn to try the mat-

ters in difference between the parties, and, having heard the evidence, returned their verdict in favor of the plaintiff for three hundred dollars, and defendant moved to set aside the verdict of the jury, and to arrest the judgment, and grant it a new trial, for the reasons that the verdict was contrary to the law and the evidence in the case; because the court denied the defendant a trial by a legal and constitutional jury of twelve; because the court misdirected the jury by its instructions given for the plaintiff; because it refused to give instructions Nos. 1 and 2 asked by the defendant; because the damages for amount found by the jury were excessive, and that no damage beyond the price of a ticket from Gray to Kenova was shown; because, the plaintiff's action being in tort, on the facts proved the verdict should have been for the defendant,—of which motion the court took time to consider, and on the 13th day of June, 1898, the court overruled the motion, and rendered judgment on the verdict, to which ruling defendant excepted, and filed its bill of exceptions, which was duly signed, sealed, and made a part of the record. Defendant obtained a writ of error to said judgment, assigning as error, among other things, the refusal of the court to impanel a jury of twelve men to try the case, and sustaining plaintiff's objection thereto, and impaneling a jury of six to try the case, over the objection of defendant, and claiming that section 169, chapter 50, of the Code is unconstitutional and void, and is repugnant to and in violation of section 13, Article III, of the Constitution of 1872, as amended. This raises the question directly whether the defendant had a right to trial of this case by twelve men, as evidently contemplated by said section 13, Article III., when it was in the circuit court on appeal. The section referred to provides that "in suits at common law, when the value in controversy exceeds twenty dollars exclusive of interest and costs, the right of trial by jury, if required by either party, shall be preserved." This provision certainly applies to all courts of record having jurisdiction to try the rights of parties. A further provision is added, "and in such suit before a justice a jury may consist of six persons." What constitutes the jury the right of trial by which is so sacredly preserved? It means and can only

mean the common law jury of "twelve good and lawful men." In 2 Hale, P. C., 161, it is said: "In case of a trial by the petit jury it can be by no more nor less than twelve, and all assenting to the verdict." 1 Chit. Cr. Law, side page 105: "The petit jury, when sworn, must consist precisely of twelve, and is never to be more or less on the general issue; and this fact it is necessary to insert upon the record." In *Bank* v. *Anderson*, 1 Mo. 244, the provision in the Constitution of Missouri that "the trial by jury shall remain inviolate," was construed to mean that, "with respect to facts, the trial shall be by twelve men, and they shall all and each of them be good and lawful men." A provision in the act organizing the St. Louis law commissioners' court, prescribing that "in all jury trials in said court the jury shall consist of six lawful jurors, or a less number if the parties shall consent thereto," was, in the case of *Vaughn* v. *Scade*, 30 Mo. 600, held to be unconstitutional; the court holding that "juries in that court, as in all courts of record, must consist of twelve men." In that case the plaintiff demanded a jury, when the defendant demanded a jury of twelve, which the trial court refused, and impaneled a jury of six, under the statute, *Henning* v. *Railroad Co.*, 35 Mo. 408: "In trials in the circuit court the parties are entitled to demand a jury of twelve men." *Byrd* v. *State*, 1 How. (Miss.) 177; *State* v. *Cox*, 8 Ark. 436; *Dowling* v. *State*, 5 Smedes & M. 664. The Constitution of 1872 (Article III., § 13) provided that "in suits at common law, when the value in controversy, exclusive of interest and costs, exceeds twenty dollars, the right of trial by jury of twelve men, if required by either party, shall be preserved; except that in appeals from the judgments of justices, a jury of less number may be authorized by law; but in trials of civil cases before a justice, no jury shall be allowed;" and section 123, chapter 226, Acts 1872-73, carried this provision for trial of appeal cases into effect. The legislature of 1879 proposed an amendment to said section 13 of Article III. of the Constitution so that it should read: "In suits at common law, when the value in controversy exceeds twenty dollars, exclusive of interest and costs, the right of trial by jury, if required by either party, shall be preserved; and in such

suit before a justice a jury may consist of six persons. No fact tried by a jury shall be otherwise re-examined in any case than according to the rules of the common law." This section, as amended and proposed by the legislature, was adopted by the people at the succeeding election, and it became a part of the constitution. Evidently the legislature in proposing, and the people in adopting, this change had an object and purpose in it, and it clearly accomplished two things: It took from the legislature the power to authorize by law the circuit courts in appeals from the judgments of justices to impanel juries composed of a less number than twelve to try such appeals, and it gave either party the right to demand and have a jury of six in a case before a justice. It will be observed that the section so amended contained a provision for a jury of less number than twelve in the circuit courts to try appeals from justices. This provision is left out of the amended section. The section amended prohibited the use of a jury before a justice, while the same as amended grants the right to either party to require a jury before a justice. In *Barlow* v. *Daniels*, 25 W. Va., at page 517, JUDGE SNYDER, says: "The seventh amendment to the Constitution of the United States, as well as the provisions of our own Constitution now under consideration, declares that 'in all suits at common law, when the value in controversy exceeds twenty dollars, the right of trial by jury shall be preserved.' In what does the right of trial by jury consist? The Constitution furnishes no answer. It is spoken of as something already sufficiently understood, and referred to as a matter already familiar to the public mind. It was unnecessary to define this great right. It there stood as the representative of an idea as certain and definite as any other in the whole range of legal learning. * * * By the common law the number of jurors must be twelve. They must be impartially selected, and must unanimously concur in the verdict. *Work* v. *State*, 2 Ohio St. 296; *State* v. *McClear*, 11 Nev. 39; *Turns* v. *Com.*, 6 Metc. (Mass.) 225; *Norval* v. *Rice*, 2 Wis. 22; *May* v. *Railroad Co.*, 3 Wis. 197." In *Traction Co.* v. *Hof*, 174 U. S. 1, 19 Sup. Ct. 580, 43 L. Ed. 873, it is held that: "Trial by jury in the primary and usual sense of the term at the

common law and in the American constitutions is a trial by a jury of twelve men, in the presence and under the superintendence of a judge empowered to instruct them upon the law and to advise them upon the fact, and (except upon acquittal upon a criminal charge) to set aside their verdict if, in his opinion, it is against the law or the evidence. * * * Congress, in the exercise of its general and exclusive power of legislation over the District of Columbia, may provide for the trial of civil causes of moderate amount before a justice of the peace, or in his presence, by a jury of twelve or any less number, allowing to either party, when the value in controversy exceeds twenty dollars, the right to appeal from the judgment of the justice of the peace to a court of record, and to have a trial by jury in that court." It seems very clear that the Supreme Court of the United States does not regard the trial of a case before even a jury of twelve impaneled by a justice of the peace under the act of congress as such "trial by jury" as is guaranteed to the citizens under the Constitution. It concedes that congress may provide for such trial of a civil case before a justice, or in his presence, by a jury of twelve or any less number, but in any matter involving more than twenty dollars, the right of appeal must be allowed to either party from the judgment of the justice to a court of record, when he may have a trial in said court before a common law or constitutional jury. It is claimed by appellee that section 28, Article VIII., is conclusive that the jurisdiction of justices in civil cases is alone statutory, and the closing provision in that section that "appeals shall be allowed from judgments of justices of the peace in such manner as may be prescribed by law" is broad enough to comprehend the act providing for a trial of such appeal by a jury of less than twelve, whether of six, four, three, or two. The provision that appeals shall be allowed in such cases "in such manner as may be prescribed by law" surely does not throw the gate open as wide as that. It is true, the jurisdiction is statutory, but the cause of action is that of a common-law action. The nature of the claim is not changed because it is brought before a justice. If plaintiff had chosen to bring his action in the circuit court, and laid his damages at fifty-one dollars, the defend-

ant could have demanded "a jury of twelve good and lawful men," and an objection by the plaintiff to the impaneling of such a jury would not have been entertained for a moment. The last clause of said section 8 simply intended the legislature to provide the details of such appeal, conditions, bond, etc., to get the case into the circuit court, and onto its docket, and regulations as to the pleadings, if such were deemed necessary. But when it is so clearly expressed in another part of the constitution as in ours that when more than twenty dollars in value is involved in controversy in suits at common law "the right of trial by jury, if required by either party, shall be preserved," the provision under which it is claimed the lawmaking power acted should be expressed in language no less clear and unmistakable, especially when the effect of such action is to invade an essential right, which for centuries has been the boast of the Anglo-Saxon race, and which is frequently referred to by the courts of this country as "the palladium of our liberties." In *Thompson* v. *Utah*, 170 U. S. 343, 18 Sup. Ct. 620, 42 L. Ed. 1061, Justice Harlan says at page 349, 170 U. S., page 622, 18 Sup. Ct. and page 1066, 42, L. Ed.: "When *Magna Charta* declared that no freeman should be deprived of life, etc., 'but by the judgment of his peers or by the law of the land,' it referred to a trial by twelve jurors. Those who emigrated to this country from England brought with them this great privilege 'as a birthright and inheritance, as a part of that admirable common law which had fenced around and interposed barriers on every side against the approaches of arbitrary power.'" Quoting again from *Traction Co.* v. *Hof*, Mr. Justice Gray says: "Lord Hale, in his History of the Common Law (chapter 12), 'touching trial by jury,' says another excellency of this trial is this: that the judge is always present at the time of the evidence given in it. Herein he is able in matters of law, emerging upon the evidence, to direct them. * * * And thus, as the jury assists the judge in determining the matter of fact, so the judge assists the jury in determining points of law, and also very much in investigating and enlightening the matter of fact whereof the jury are the judges. It has the advantage of the judge's observation, attention, and assistance in point of

law by way of decision, and in point of fact by way of direction to the jury." 2 Hale, Com. Law, (5th Ed.) 147, 156. See, also, 1 Hale, P. C. 33. In 5 Bac. Abr. 308, it is said: "The trial *per pais* or by a jury of one's country is justly esteemed one of the principal excellencies of our Constitution; for what greater security can any person have in his life, liberty, or estate than to be sure of not being devested of or injured in any of these without the sense and verdict of twelve honest and impartial men of his neighborhood? And hence we find the common law herein confirmed by *Magna Charta*." That this right, which has been so long valued so highly, should be frittered away by the courts on a strained construction of a section in the fundamental law adopted by the people appears like trifling with serious things. If it had been the intention to give section 28, Article VIII., the effect claimed by appellee, the closing paragraph should have been made to read, "Appeals shall be allowed from judgments of justices of the peace in such manner as may be prescribed by law, and the legislature may provide for the trial thereof by a jury of six men," or any other number named, less than twelve.

Appellee cites *Fletcher* v. *Peck*, 6 Cranch 87, 3 L. Ed. 162, where it is held, "The court will not declare a law to be unconstitutional, unless the opposition between the constitution and the law be clear and plain;" also *Slack* v. *Jacob*, 8 W. Va. 612; *State* v. *Strauder*, *Id.* 686, and other citations to same effect. We freely admit the principle held in these cases, but we are unable to see how it can be applied in case at bar, as the common-law right of trial by jury, if required by either party, is so positively provided for in the constitution that it is impossible that any other number than twelve was meant and intended, and there is nothing in that instrument authorizing a provision for any other number in a court of record. It is claimed also that a strong reason why section 169, chapter 50, of the Code should be held constitutional is the long acquiescence of the legislatures, the courts, and the people in the presumed constitutionality thereof; that this law has been upon the statute books of the State since its birth. Under the Constitutions of 1863 and 1872 there was a special pro-

vision for juries of six in cases appealed from justices. After the adoption in 1880 of the amendment to section 13, Article III., of the last-named Constitution, section 169 was re-enacted, and in re-enacting the same without change to conform to the Constitution as amended, the legislature must have simply overlooked it. Prior to that time the question could hardly have been raised, because it was provided for in the Constitution; and after the people had taken it upon themselves to strike out the provision authorizing the legislature to enact such a measure, it seems that no suitor whose rights were involved had ever chosen to make a demand for a jury of twelve men, and test the question in the courts,--the only way in which it could be tested. The courts acquiesce in all acts of the legislature, whatever may be their repugnance to the Constitution, until the question comes up in a case or proceeding in the court for trial or hearing. It is no part of the duty of courts to examine the acts as they come from the hands of the legislature, and decide which are and which are not in harmony with the Constitution, and the people do not make it their business to inquire into the matter except through the legally constituted channel, the courts, and when the question fairly comes up in the courts it becomes their duty to honestly investigate, and if it is clear that not only the spirit, but the letter, of the Constitution is violated by the act in question, whatever the time that has elapsed since the enactment, the plain duty of the court is so to declare it. It has been well said that "it is better to be right than to be consistent with the errors of a hundred years." When there is doubt only as to the constitutionality of a law, the act should have the benefit of the doubt. *Railway Co.* v. *Miller*, 19 W. Va. 408 (Syl., point 3). "When the text of a constitutional provision is plain and unambiguous, courts, in giving construction thereto, are not at liberty to search for its meaning beyond the instrument itself" and we must consider, in the matter before us, not only what the section contains as affirmative matter, but what its adoption repealed and struck out. Appellee relies, on the question of long acquiescence in the validity of a law, on the arguments of JUDGES GREEN and SNYDER in *State* v. *Cottrill*, 31 W. Va.

162 (6 S. E. 428), where the constitutionality of section 29, chapter 116, Code, was considered, and on which the court equally divided. These judges give weight to this acquiescence only when there is doubt as to the constitutionality of the act, but they say, "This uniform and unquestioned practice, it is conceded, would not conclude this Court in regard to a statute which was a plain and positive violation to the Constitution."

Appellee contends that the case of *Michaelson* v. *Cautley*, 45 W. Va. 533 (32 S. E. 170), cited by appellant, is not in point. It is true that was a case tried by a jury in justices' court, and taken to the circuit court on *certiorari*, while this was an appeal from the judgment of a justice without a jury; but it makes no differencce whether it was tried before the justice by a jury or by the justice. JUDGE DENT, in the *Michaelson-Cautley Case*, struggling with the inconsistencies of the Court in former decisions in its efforts to harmonize the statutes with the Constitution, and yet preserve the right of the citizens to "trial by jury," as contemplated by the Constitution, makes this pertinent observation: "How much better would it have been for the Court to have held in the case of *Barlow* v. *Daniels*, 25 W. Va. 512, that the two provisions of the Constitution under consideration should be construed together, so as to read: 'In suits at common law, when the value in controversy exceeds twenty dollars, exclusive of interest and costs, the right of trial by jury, if required by either party, shall be preserved; and in suits before a justice a jury may consist of six persons. No fact tried by a jury shall be otherwise re-examined in any case than according to the rules of the common law,' except 'appeals shall be allowed from judgments of justices in such manner as may be prescribed by law.' This was undoubtedly the plain meaning and intention of the Constitution makers, and, if it had been adhered to, the illegal and inconsistent conclusions of the Court might have been avoided, and the ends of justice better promoted. It never entered the minds of the Constitution makers to construe the word 'appeals' to mean 'writ of error', or '*certiorari*' in this connection; for they well knew that a justice's court was not a court of record, nor the justice usually a man

learned in the law; and they never intended that upon his shoulders should be imposed the laborious task of instructing juries on intricate and difficult points of law; and of making up and signing bills of exceptions embodying his rulings. The jury was reduced to six in number for the reason that an appeal as a matter of right would furnish an adequate remedy, if they erred, or there was dissatisfaction with the verdict."

It is assigned as error that the court erred in giving plaintiff's instruction No. 1, and refusing to give defendant's instrucitons Nos. 1 and 2. Plaintiff's instruction No. 1 is as follows: "The court instructs the jury that if they believe, from all the evidence in this case, that the defendant, Thomas Lovings, did, on the night of the 8th of November, 1897, purchase from the agent of the Norfolk and Western Railway Company, at Welch, a second-class ticket from the station of Welch, on the said road, to the station of Kenova, on said road, and paid for the same, and that, after purchasing the said ticket, he took the train No. 3 of said company on that night at Welch, and that while on said train the conductor of said train on the said Norfolk and Western Railway Company took up his ticket, and that afterwards, between Welch and Kenova, he was wrongfully ejected by a conductor of the said train No. 3, they must find for the plaintiff, although the conductor who ejected him was not the same conductor who took up his ticket." This instruction should not have been given in its present form. It is improper, as there is no evidence tending to prove a wrongful ejectment of plaintiff from the train by the second conductor. Plaintiff, in his own testimony, says that the conductor, Walters, who was on the train from Welch to Gray, took up his ticket before they reached Gray; that when the second conductor called for his ticket he had none to produce, and could not pay his fare. It was the plain duty of the conductor, under the rules of the company, to eject him, using no more force than was necessary, which he did by stopping the train, and simply telling him to get off, and he got off. There is no pretense that he put him off by force. *McKay* v. *Railroad Co.*, 34 W. Va. 65 (11 S.E. 737), 9 L. R. A. 132 (Syl., point 1): "A railroad conductor may demand a

ticket as evidence of a passenger's right of passage, or, on failure of the passenger to produce it, may demand payment of fare, and, on failure to pay it, may lawfully eject the passenger from the train, using no more force than necessary." In that case the passenger had purchased a ticket from an agent for a certain trip, and by mistake of the agent was given a ticket in an opposite direction, and it was held that the action had to be based upon the breach of the contract to convey the passenger. This case was also approved in *Trice* v. *Railway Co.*, 40 W. Va. 271 (21 S. E. 1022). *Shelton* v. *Railway Co.*, 29 Ohio St. 214, is to the same effect, and was just such a case as that at bar, where a passenger had purchased a ticket which was afterwards wrongfully taken up by one of defendant's conductors, and plaintiff was not thereby relieved from the duty of providing himself with a ticket or paying fare on another train of defendant in which he was a passenger; and it was then held that the right of action of the passenger would be for wrongful taking up of the ticket, and not for having been removed from a train by another conductor for refusing to pay fare. *Railroad Co.* v. *Griffin*, 68 Ill. 499; *Hall* v. *Railroad Co.*, (C. C.) 9 Fed. 585; *Townsend* v. *Railroad Co.*, 56 N. Y. 295; *Hibbard* v. *Railroad Co.*, 15 N. Y. 455; *Yorton* v *Railway Co.*, 54 Wis. 234, 11 N. W. 482; *McClure* v. *Railroad Co.*, 34 Md. 532; *Weaver* v. *Railroad Co.*, 3 Thomp. & C. 270; *Crawford* v. *Railroad Co.* 26 Ohio St. 580; *Marshall* v. *Railway Co.*, 78 Mo. 610; *Bradshaw* v. *Railroad Co.*, 135 Mass. 407; *Hufford* v. *Railway Co.*, 53 Mich. 118, 18 N. W. 580; *Railroad Co.* v. *Bills*, 118 Ind. 221 (20 N. E. 775); *Railroad Co.* v. *Gants*, 38 Kan. 618, 17 Pac. 54; *Railroad Co.* v. *Stocksdale*, 83 Md. 245, 34 Atl. 880.

Defendant's instruction No. 1 offered, to which plaintiff objected, and the objection was sustained, and instruction refused, was to the effect that, although the jury may believe from the evidence the fact of the purchase of the ticket, and the taking up of the same by Walters, the first conductor, before they reached Gray station, and giving plaintiff a conductor's tag or slip of paper, and that between Gray and Kenova stations the second conductor, Fink, demanded of plaintiff a ticket, which he failed to produce, because he

averred that Conductor Walters had taken it up, and that plaintiff refused to pay his fare from Gray to Kenova, and by reason of which Conductor Fink, without unnecessary force or violence, ejected him from the train, then the plaintiff cannot recover in this case, and the jury should find for the defendant company. And the second instruction was to the effect that if they shall believe, from the evidence, the purchase of the ticket, that plaintiff took passage on the train; that Conductor Walters took from the plaintiff the ticket; that at Gray the crew was changed, another conductor took charge of the train, and called upon plaintiff for his ticket, and he failed to produce it, and refused to pay his fare, and was ejected from the train without unnecessary force, then the plaintiff cannot recover in this case. This is an action brought before a justice of the peace, and, as held in *O'Connor* v. *Dils*, 43 W. Va. 54 (26 S.E. 354) (Syl., point 1), "common-law forms of actions, in so far as justice's trials are concerned, are entirely abolished by section 49, chapter 50, Code"; and syllabus, point 2, holds "the words 'damages for a wrong' are, in substance, according to their legal definition, equivalent to the words, 'money due on contract,' the former phrase being broader than and including the latter according to ordinary legal phraseology and meaning." The defendants' instructions were asked on the theory that plaintiff's action was founded alone upon the tort, the wrongful ejectment. They were properly rejected. For the reasons herein set out, the judgment is reversed, and the case remanded for a new trial.

Reversed.

CHARLESTON.

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CLEAVENGER v. FRANKLIN FIRE INS. CO. OF WHEELING, W. VA.

Submitted January 11, 1900.—Decided March 31, 1900.

1. INSURANCE—*Application—Representations.*

Where a party makes application for a policy of insurance to the agent of the company, designating in said application the company from which he desires the policy, describing therein the property, and answering the usual questions as to ownership, liens, etc., and in his absence, and without his consent or knowledge, said application is so changed as to make it an application to another and different company, which issues the policy, varying in several respects from the application, which latter is sent by mail to the assured, although such party accepts the policy, he is not bound by the representations and answers contained in said application, and said policy will not be avoided if such representations and answers, are not true. (p. 609).

2. SALE OF PROPERTY INSURED—*Decree—Possession—Title—Location.*

Where, during the life of the policy, a decree is obtained in *invitum* for the sale of the property insured, but sale under said decree is not made until after the loss by fire, and then the property is bought in by the assured, and there is no change of possession, the policy will not be avoided by a clause therein providing that the policy shall become void if any change takes place in the title, interest, location, or possession of the property, or any part thereof, whether by sale, gift, or other voluntary act of the assured, or by legal process or judgment, or otherwise. (p. 608).

3. CONSTRUCTION OF POLICY LIBERAL—*Insured—Preference.*

In the interpretation of a policy of insurance in all cases it must be liberally construed in favor of the insured, so as not to defeat, without necessity, his claim to the indemnity, which, in making the insurance, it was his object to secure; and, when the words are without evidence susceptible of two interpretations, that which will sustain his claim and cover the loss must in preference be adopted. (pp. 609-610).

4. REMEDY—*Equity—Relief.*
A doubtful or partial remedy at law does not exclude the injured party from relief in equity.

5. POLICY—*Written Application—Proof.*
Where a policy of insurance is issued without any written application on the part of the assured so far as the facts appear, the assured, in offering in evidence the policy, is not required to read with it, as part thereof, a written application produced by the insurer, without proof that it was signed by the assured or his agent. (p. 605).

Appeal from Circuit Court, Roane County:

Suit by John C. Cleavenger against the Franklin Fire Insurance Company of Wheeling, West Virginia. Decree for plaintiff, and defendant appeals.

Affirmed.

HUBBARD & HUBBARD, for appellant.

SCHILLING & STARKEY and WALTER PENDLETON, for appellee.

ENGLISH, JUDGE:

This was a suit in equity, brought by John C. Cleavenger against the Franklin Fire Insurance Company of Wheeling, West Virgiania, in the circuit court of Roane County. The plaintiff, in his bill, alleges that on the 17th of April, 1894, the defendant caused to be made a certain policy of insurance in writing, whereby, in consideration of eighteen dollars premium, said company insured said plaintiff against all direct loss or damages by fire to the amount of one thousand, eight hundred dollars, and would make good any such damage resulting from fire, not exceeding said sum, for the term of three years from April 17, 1894, at noon, to April 17, 1897, at noon, on certain premises and personal property situate therein, then, and ever since the property of plaintiff, in said policy described as follows: one thousand, two hundred dollars on plaintiff's two-story tin-roof dwelling and additions thereto, occupied as a residence only (setting forth in detail what was included as part of the dwelling, as described in the policy, situated on a farm owned by assured near Spencer, West Virginia); six hundred dollars on household furniture (specifying the articles as mentioned in the policy);

the said loss or damage to be estimated acccording to the actual cash value of said property immediately preceding the fire or the time the loss should happen, to be paid by defendant sixty days after due notice and proof thereof should be furnished to it in conformity with the conditions of said policy, and compliance with same, unless said defendant should give notice to plaintiff of its intention to rebuild or repair the damaged premises within thirty days after fire and proof of loss, etc.; setting forth in substance and effect the conditions, prohibitions, and stipulations of said policy. The plaintiff also alleges that at the time he made application for said insurance he signed a written or printed application therefor, which was turned over to the defendant's agent, and he has not since seen the same, nor does he remember the contents thereof, nor know in whose possession the same is, but was informed and believes the defendant had same in its custody, and he cannot, therefore, furnish the same, or file it with his bill, and calls on defendant to produce and file said papers with its answer, if the same be in its possession; that he was unable to produce or file in any suit or action said original policy of insurance issued by defendant to him, or a copy thereof, because the same had been lost or destroyed without the fault of plaintiff; that he had searched diligently for said policy, and was unable to find it and he verily believed the same was destroyed by fire at the time the premises were destroyed as therein stated. The plaintiff further stated that he was, both before, at the time of making said insurance policy, and ever since then, interested in the insured premises mentioned and described in said policy to the full value of same; that the dwelling house, with its appurtenances, so insured, was worth at least one thousand, eight hundred dollars, and the personal property contained therein was worth at least one thousand, two hundred and fifty dollars, and that his interest in the property insured and destroyed amounted in the aggregate to three thousand and fifty dollars; that on or about the 4th of August, 1895, the said dwelling house, with household furniture etc. mentioned in said policy, were consumed and destroyed by fire and damage and loss were thereby occasioned to plaintiff to the amount of three thousand and fifty dollars in such

manner and under such circumstances as to come within the stipulations, promises, and undertaking of defendant in said policy contained, and to render liable and oblige said defendant to insure the plaintiff to the amount of one thousand, eight hundred dollars against loss by fire, with interest from August 4, 1895, and to make good to him any such loss by fire as should happen by fire, not exceeding said sum of one thousand, eight hundred dollars, with interest as aforesaid; and that due notice and proof were afterwards made by plaintiff to defendant in conformity with the conditions of said policy; that, although sixty days had elapsed since such notice and proof were made to said defendant of said destruction by fire, and of the loss and damage thereby occasioned to the plaintiff, the same had not been paid or made good, but that the same, and every part thereof, was wholly unpaid and unsatisfied to him contrary to the force and effect of said policy; nor did the defendant within thirty days after final proof of the loss was received by it, give notice of its intention to rebuild, repair, or replace the property destroyed; and that although often requested, the defendant has not kept with plaintiff the agreement contained in said policy, but has broken same, and has hitherto wholly refused, and still refuses, to keep said agreement. The plaintiff further alleges that by reason of the loss of said policy of insurance he has no adequate and complete remedy at law, and is advised that a court of equity will give relief against the accident of said loss and destruction of said paper by setting up the evidence of plaintiff's claim against defendant, and will adjudicate the full merits of the claim; and he prays that, if he has failed in any particular to set out in his bill the contents of said policy so lost, defendant may be required to answer this bill, and disclose and discover in what respect plaintiff has so failed, and that he be relieved against the loss of said paper, and the evidence of the defendant's indebtedness may be set up, and that he may have a decree against defendant for said one thousand, eight hundred dollars, with interest, and general relief.

The defendant demurred to plaintiff's bill for want of equity, and because the bill failed to set forth the assured's application and survey, which, by the terms of the

policy, is made a part thereof, and because the bill does not show what loss or damage accrued to complainant by reason of the burning of the personalty, and because the bill does not set forth facts showing that the loss was such as to come within the terms of the policy; that the bill does not show compliance by the plaintiff with the conditions precedent of the policy sued on, and that it does not show when notice of loss and proof were made as required in the policy, and therefore does not show when the complainants's right to sue would accrue, if at all. The defendant filed its answer to plaintiff's bill, admitting the issuance of the policy on the 17th of April, 1894, covering the dwelling house to the extent of one thousand, two hundred dollars, and personalty to the extent of six hundred dollars, and that the policy is set forth correctly, but that the application constitutes a part of the policy, and referring to the second section of the printed portion of the policy, which provides that "if an application, plan, or description of the property be made in procuring the insurance, or be referred to therein, it shall be part of the policy, and a warranty by the assured," and to the written part of the policy, which reads as follows: "Special reference is made to assured's application and survey No. 881, which is hereby made a part of the policy, and a warranty by the asssured;" insisting that said application is a material part of the contract of insurance sued on, and is a warranty by the complainant, but was not set forth in the bill; and averring that such an application was made by the complainant in procuring said policy, and should have been set forth in his bill as part of the contract of insurance; and further alleging that said application was and had been in possession of the respondent, who, before the allegation of the bill in that respect was made, offered to exhibit the same to plaintiff's counsel, and furnish a copy thereof, which offer was declined, and defendant denies the allegation that plaintiff was unable to set forth the contents of such application in his bill.

Defendant also alleges that the original application is filed as an exhibit with its answer, which shows how the insurance provided by the contract was distributed, and by which it was understood and agreed that, in the event

of loss, the defendant should not be liable for an amount greater than three-fourths of the actual cash value of the property covered by the policy at the time of such loss; also alleging that the second section of said policy provides that "this entire policy is void if any statement contained in such application, plan, survey, or description be untrue, or if the assured is not the sole and unconditional owner of the entire property, or if any building intended to be insured stands upon grounds not owned by both a legal and an equitable fee-simple title by the assured, or if the interests of the assured in the property be not truly stated herein, or if the property or any portion thereof be incumbered by any mortgage, deed of trust or lien." Respondent also says that said application so made and signed by complainant contained the following question: "State the nature of your title, whether fee simple, leasehold, or by bond or agreement. If others are interested, give name, interest, and value;" to which the answer by complainant was, "Fee simple." Respondent further alleges that at the time of making said application and issuing the policy of which it was apart, the assured was not the sole and unconditional owner of the entire property; that the building intended to be insured by said policy stood on ground not owned by either a legal or equitable fee-simple title by complainant; that the interest of the assured in said property was not truly stated in the policy, etc.; that the assured, at the times aforesaid, owned only one undivided one-third of the real estate on which was the property insured; that the warranty in that behalf contained in said application was broken, and by reason of the facts aforesaid, and the provision of the second section of said policy, the entire policy was and is void. Respondent further says the said application contained this question: "What incumbrance, if any, is now on said property?" to which the assured made answer in writing, "None." Respondent then proceeded to set forth certain judgment liens and incumbrances on said real estate mentioned in said policy, and further alleged certain misrepresentations and concealments as to the ownership and value, situation, and condition of said property, which it claimed rendered said policy void; also that at the time said policy was issued a chan-

cery suit was pending to enforce certain liens upon said real estate, and that a decree was rendered, after the issuance of said policy, to sell the land, and that in August, 1894, the said land and building were sold under said decree, and were purchased by plaintiff himself, by reason whereof the said policy became void; also, that on or about September 4, 1895, the plaintiff made a written statement, signed and sworn to by him, setting forth that there had been no change in the title, use, occupancy, location, possession, or exposure of said property since the policy was issued, whereas the fact was that the title to said property had been changed since the policy was issued, by the decrees and sale by the chancery suit aforesaid, which was an attempt at fraud by the assured by false swearing, causing a forfeiture of all claims under said policy. The defendant calls for proofs as to the alleged destruction of the policy by fire, and denies that the insured property was destroyed by fire.

The plaintiff filed a special replication to said answer, in which he alleges that in fact no application, plan, or survey of the property described in said policy mentioned in said answer was made by plaintiff in procuring said insurance, but that the agent of the Jefferson Insurance Company made an inspection of the premises, and took from him an application to said company for a policy of insurance, being the same application filed as Exhibit A with the defendant's answer, but which has been materially altered since it was signed by plaintiff, without his knowledge or consent, and is, therefore, no part of the policy of insurance sued on in this cause, said application having been made to an entirely separate and distinct company; that he made no representations to the defendant company or its agents concerning the title or condition of said property, or of his interest therein, or as to any incumbrances thereon at the time of procuring said policy, or any other time, but that, if the court should hold that the application filed as Exhibit A with the defendant's answer should be treated as an application to the defendant for the said policy, then plaintiff said that he did truly and correctly state to said agent the condition of his title to said property and his interest therein, also the existence of the liens referred to in the an-

swer, but that said agent did not correctly and fully write down plaintiff's answers to said questions fifteen and seventeen, respectively, in said application to the Jefferson Insurance Company, filed as Exhibit A with defendant's answer, and therefore he is not bound by such answers; that the policy sued on had no provision therein, as is set out in said application, reciting that the defendant was not to be liable for a greater amount than three-fourths of the actual cash value of said property at the time of such loss, but recited as follows: "Provided, that no claim for loss shall exceed in any event the sum or sums insured, nor the interest of the assured in the property, nor the actual value of the property immediately preceding the fire, which cash value should in no case exceed what would then be the cash cost to the assured of repairing or replacing, and the company should have the option of rebuilding, repairing, or replacing the property by giving notice of their intent so to do within thirty days after proof of loss shall have been received." Plaintiff further says that the said policy contains the contract between the plaintiff and the defendant as to amount of insurance to be paid in the event of loss, and denies that the same provided that the defendant should be liable only for three-fourths of the value of the property destroyed; that, if the court holds that said application filed as Exhibit A is a part of the policy of insurance, then that the said three-fourths clause therein does not constitute a contract between them; said contract having been wholly prepared by the defendant subsequent to said application reciting the agreement above quoted, and accepted by plaintiff with said clause therein, becomes and is binding on defendant as its contract, and so plaintiff says the defendant is not entitled to take advantage of the representations, conditions, or statements contained in said application. The plaintiff also filed an amended bill, in which he alleges that at the time of filing his original bill, and when defendant's answer was filed, he was under the impression that he had made an application to the defendant for said policy, and that he had signed a written or printed application therefor, which was turned over to the company's agent, and made an allegation in his bill to that effect; but since filing said application with its answer

on the day of taking the depositions in the cause he has discovered for the first time that he was mistaken as to having made such written or printed application to the defendant for the said policy; that on seeing the application his memory was refreshed with reference thereto, and the fact is he never made any application to defendant company, either written or printed, for said policy, but made application for same to the Jefferson Insurance Company on said property, which is the same application filed with the defendant's answer, except that the same has been altered since it was signed by plaintiff and delivered to defendant's agent, in this: that the word "Franklin" has been written over the word "Jefferson" in blue pencil since its delivery to said agent, which alteration was made without the knowledge or consent or authority of plaintiff. He further says that no application, plan, survey, or description of the property insured was made to the defendant in procuring the insurance under the said policy recited in the original bill, but that said policy was issued to the plaintiff without any written or printed application being made by him therefor.

The defendant objected to the filing of said amended bill. The objection was overruled, and thereupon the defendant demurred to said amended bill. The demurrer was overruled, and the defendant filed its answer to said amended bill, denying the material allegations thereof. A portion of the facts were agreed, depositions taken by both plaintiff and defendant, and a final decree was entered in the cause on the 29th of August, 1898, holding that the plaintiff was entitled to the relief prayed for, and decreeing that he recover from the defendant the sum of two thousand one hundred and four dollars and eighty cents, principal and interest to that date, and costs. From this decree the defendant obtained this appeal.

The first error assigned is that the court erred in overruling the defendant's demurrers, the defendant insisting that no decree should have been rendered against it upon the plaintiff's bill for any amount, jurisdiction in equity having been claimed on the ground that the policy sued on had been lost or destroyed. In support of the demurrer it is claimed that by the terms of the policy the assured's

application was made part of the policy, and should have been so stated in the bill. The plaintiff denies in his amended bill that he made any application whatever to the Franklin Company, but says he did apply to the Jefferson Company for a policy of insurance; that said policy was prepared by the Jefferson Company's agent, and signed by plaintiff; and it appears that after the policy left the hands of the agent, Lowe, with whom he was dealing, the name "Jefferson" was struck out, and "Franklin" inserted in its room and stead. In his deposition plaintiff was asked: "State whether or not you ever made or signed any written application to the Franklin Insurance Company, of Wheeling, West Virginia, the defendant in this case, for the policy of insurance sued on," and answered, "I did not." The agent, Lowe, in his deposition, states that he had some blank applications of the Peabody Insurance Company, that plaintiff seemed to prefer the Jefferson Company, and he struck out the name "Peabody," and inserted "Jefferson" in the application. It appears that after the application left Mr. Lowe's hands the name "Jefferson" was struck out, and "Franklin" written above it by some person unknown to either plaintiff or Lowe. Now, as to the effect of this alteration without the knowledge or consent of plaintiff, it is held in *Newell* v. *Mayberry*, 3 Leigh 250, that: "If a written agreement not under seal be altered by the party claiming under it in a material part, he can never recover upon the agreement so altered, nor can he avail himself of the contract in its original and true form. There is no distinction between deeds and other written instruments in this respect." It is clear that an application to the Jefferson Insurance Company for an insurance policy can in no sense be held or considered as an application to the Franklin Insurance Company for a like policy. See 2 Am. & Eng. Enc. Law (2d Ed.) 187. What is the result if this application be relied on by the defendant, which was never made by the plaintiff to the defendant, but was made to another and different company, and thus materially altered without his knowledge or consent? The agent, Mr. Lowe, when asked how the word "Franklin," in blue pencil, came to be written over the word "Jefferson," answered: "I don't know as I can answer as to

why it was done, only as I would presume that it was done by the agent. It has been done by parties other than myself. I did not do it." This same witness says: "After I had mailed the application to the agent, Mr. Cleavenger asked me why it was they had written him in the Franklin instead of the Jefferson, and I told him that sometimes when one company would not accept a risk, it was passed over to another by the agent, and was accepted by another company, and I supposed this was the case with this application, and told him at the time that I considered the Franklin just as good as the Jefferson, or Peabody, either. He seemed to be satisfied with it, and I never heard anything more in regard to the policy." Can we say that this constituted a ratification of the action of the agent of said company in changing an application to the Jefferson into an application to the Franklin, in the absence and without the consent of the plaintiff? The witness says he seemed to be satisfied with it, but, so far as the evidence discloses, he was silent. Can this application, altered in this material manner, be read or considered as part of this policy? I think not. In its present form it was never signed by John C. Cleavenger, nor did he apply to the Franklin Insurance Company. In *Harvey* v. *Insurance Co.*, 37 W. Va. 273, (16 S. E. 581) (Syl., point 8), it is held that: "Where a policy of fire insurance is issued without any written application on the part of the assured so far as the facts appear, the assured, in offering in evidence the policy, is not required to read with it as part thereof a written application produced by the insurer, without proof that it was signed by the assured or the agent of the assured." And in point 9: "When a clause in a policy refers to an application relating to warranties, misrepresentations, and concealments, and assumes to make such paper a part of the policy, and no such paper is shown, the clause which refers to it, and attempts to prescribe its place and effect as part of the contract, and to determine the consequences of misstatement, must be regarded as inapplicable to the facts of the case, and therefore nugatory." See *Insurance Co.* v. *Peck*, 133 Ill. 221, (24 N. E. 538).

Without proceeding further with the discussion of the case on its merits, it is proper to look to the demurrer in-

terposed by the defendant to the plaintiff's bill, the action of the court in overruling which is assigned as first ground of error. The defendant claims that the plaintiff is not entitled to relief in equity, and that he had a plain, complete, and adequate remedy at law. Now, as before stated, the bill alleges that the plaintiff is unable to produce or file in any suit or action said original policy issued by defendant, or a copy thereof, because the same has been lost or destroyed without the fault of plaintiff; and though he had made diligent search for said policy, he failed to find it, and verily believes the same was destroyed by fire at the time of the destruction of the premises. On this point this Court held in *Yates* v. *Stuart's Adm'r*, 39 W. Va. 124, (19 S. E. 423), that "courts of equity have jurisdiction where a lost instrument is set up, and the discovery sought in relation thereto is material to the relief." HOLT J. delivering the opinion of the Court, said (page 135, 39 W. Va., and page 427, 19 S. E.): "It is well established that equity has jurisdiction where a lost instrument is to be set up, especially where discovery is necessary, notwithstanding courts of law now exercise jurisdiction in the same cases; and that in such a case a court of chancery, having taken jurisdiction for one purpose, will adjudicate the whole merits of the case,"—citing *Hickman* v. *Painter*, 11 W. Va. 386; *Mitchell* v. *Chancellor*, 14 W. Va. 22. See, also, *Nease* v. *Insurance Co.*, 32 W. Va. 283 (9 S. E. 233), (Syl., point 1), where it is held that "a doubtful or partial remedy at law does not exclude the injured party from relief in equity."

The next cause of demurrer assigned is that the plaintiff's bill does not set forth the assured's application and survey, which, by the terms of the policy, is made a part thereof, and a warranty by the assured; nor show that the plaintiff has made any effort to ascertain the contents of the application, or that it is necessary to proceed by this bill to obtain information of said contents. While it is true that plaintiff recites that at the time he applied for said insurance policy he signed a written or printed application, which was turned over to the agent, but that after the filing of said original bill he ascertained that he was mistaken in this matter, and that he never made any applica-

tion, written or printed, to the defendant, for said insurance, which fact caused him to file his amended bill, thereby correcting his mistake alleging that he had signed such written application, and denying positively that any application was made by him to defendant in procuring the insurance under said policy, the testimony in the cause sustains this allegation of the amended bill. Now, the fact being that no such application was made by plaintiff to defendant for said policy, it could not have been stated as part of the policy in the bill, and we must regard this assignment of error as not well taken. As to the effect of the alteration of this application 1 Greenl. Ev. (15th Ed.) § 565 says: "Though the effect of the alteration of a legal instrument is generally discussed with reference to deeds yet the principle is applicable to all other instruments. The early decisions were chiefly upon deeds, because almost all written engagements were anciently in that form; but they establish the general proposition that written instruments which are altered in the legal sense of that term are thereby made void. The grounds of this doctrine are twofold. The first is that of public policy to prevent fraud by not permitting a man to take the chance of committing a fraud without running any risk of losing by the event when it is detected; the other to insure the identity of the instrument and prevent the substitution of another without the privity of the party concerned." The facts stated in the amended bill present additional ground for equity jurisdiction. As to the action of the court in overuling the objection to the filing of the amended bill and the demurrer thereto, it has been held in this Court in several cases that amendments of this character may be made, provided the identity of the cause of action is preserved. See *Lamb* v. *Cecil*, 28 W. Va. 633; *Kuhn* v. *Brownfield*, 34 W. Va. 252, (12 S. E. 519); *Bird* v. *Stout*, 40 W. Va. 43, (20 S. E. 852). This record shows that Cleavenger signed an application to the Jefferson Insurance Company for an insurance policy on his residence and its contents; that he paid the premium, and delivered the application to Lowe, the agent of said company, who says he mailed it to W. S. McKay, the agent at Ravenswood; but when, and by whom, the same was changed in inserting the name "Franklin" in

place of the name "Jefferson" does not appear. This policy, then, was issued by the Franklin Company without any application therefor signed by the assured. In such cases the law is thus laid down in *Insurance Co.* v. *Rodefer*, 92 Va. 747, (24 S. E. 393): "If an insurance company elects to issue its policy of insurance against a loss by fire without any application, or without any representation in regard to the title to the property to be insured, it cannot complain, after a loss has ensued, that the interest of the insured was not correctly stated in the policy, or that an existing incumbrance was not disclosed." Also, that "a condition in a fire insurance policy, which avoids it if the interest of the insured in the property be other than 'unconditional and sole ownership,' is not broken by the existence of a mortgage on the property at the date of the policy. The condition does not refer to the legal title, but to the interest of the insured, and is not a warranty against incumbrances." To the same effect, see *Wolpert* v. *Assurance Co.*, 44 W. Va. 734, (29 S. E. 1024). The plaintiff, having filed no application, and made no representation to the Franklin Company as to the character of his ownership of the insured property or the liens thereon, cannot be affected by representations made to any other company. In the case of *Gerling* v. *Insurance Co.*, 39 W. Va. 690, (20 S. E. 691), this Court held that: "A policy of fire insurance has a clause which provides that, unless otherwise provided by agreement indorsed thereon or added thereto, it shall be void if the subject of the insurance, whether real or personal property, or any part thereof, be or become incumbered by mortgage, trust deed, judgment, or otherwise, that judgments recovered in *invitum* against the insured during the life of the policy and before loss are not incumbrances within the meaning of the policy." It is an agreed fact that Cleavenger at the time the said policy was issued had a legal and equitable fee-simple title to the undivided eleven-twelfths of the tract or parcel of land containing two hundred and seventy-five acres, in Roane County, on which the buildings to be insured stood, and that said buildings were erected at his expense. It is further shown by the evidence that plaintiff had the equitable title to the remaining one-twelfth, having a parol contract,

made about November 30, 1880, with his brother, B. M. Cleavenger, whereby plaintiff was to support his brother during his life in consideration for his said interest, which contract has been fully performed, possession taken, and improvements made since the date of contract, and plaintiff is entitled to a deed therefor. See *Middleton* v. *Selby*, 19 W. Va. 168. By what legal intendment can a party procuring an insurance policy, and making application therefor to one company, be made an applicant to another and different company, simply because an agent, in the absence of the applicant, and without his consent, inserts the name of the latter company in the application; or be bound to such other company by the representations made in such application?

A discrepancy appears between the application filed with the defendant's answer and the policy. In the former three-fourths of the value is to be paid in the event of a loss, while in the latter it shall not exceed the cash value immediately preceding the fire, which would strongly indicate the absence of the application when the policy was prepared, or an attempt to furnish an application after the policy had been issued. But, be this as it may, there being no legal application in this case, the terms and conditions of the policy would prevail. In the case of *Chandler* v. *Insurance Co.*, 21 Minn. 85, it is held that: "The rule that words are to be taken most strongly against the party using them, is more applicable to the conditions and provisos of policies of insurance than to almost any other instruments. These policies are wholly prepared by the company issuing them, and should be drafted with the most scrupulous exactness. They should be absolutely free from ambiguity. A policy ought to be framed that he who runs can read. It ought to be framed with such deliberate care that no form of expression by which, on the one hand, the party assured can be caught, or by which, on the other, the company can be cheated, shall be found upon the face of it," citing *Anderson* v. *Fitzgerald*, 4 H. L. Cas. 484, 510, and many other authorities. In *Miller* v. *Insurance Co.*, 12 W. Va. 117, it was held that in the interpretation of a policy of insurance in all cases it must be liberally construed in favor of the insured, so as not to

defeat, without necessity, his claim to the indemnity, which, in making the insurance, it was his object to secure; and, when the words are without evidence susceptible of two interpretations, that which will sustain his claim and cover the loss must, in preference, be adopted.

It is claimed that by reason of the fact that said land was sold under a decree of the court, the policy was thereby forfeited. This decree, however, was rendered April 3, 1895, after the policy was issued, but before the loss occurred, was in *invitum*, and the sale under it took place after the loss; and these facts would not avoid the policy. See *Nease* v. *Insurance Co.*, 32 W. Va. 283, (9 S. E. 233), and *Gerling* v. *Insurance Co.*, 39 W. Va. 690, (20 S. E. 691), *supra*.

Proof of loss was not necessary when payment had been refused on other grounds. *Deitz* v. *Insurance Co.*, 33 W. Va. 544, (11 S. E. 50); *Shepherd* v. *Insurance Co.*, 21 W. Va. 368.

In my view of this case, the representations made by the insured in his application to the Jefferson Company can have no consideration in determining the validity of the policy, and the evidence in the record discloses no fact that would prevent the plaintiff from recovering upon said policy the amount of the loss sustained by him. The decree is therefore affirmed.

Affirmed.

47 610
149 247
49 249

47 610
52 281
52 282

CHARLESTON.

AMMONS *et al.* *v.* SOUTH PENN OIL CO.

Submitted September 9, 1899.—Decided March 31, 1900.

1. EQUITY—*Doctrine—Account.*

It is a well-established doctrine of courts of equity that it

is improper to order an account merely to afford the plaintiff an opportunity to establish by testimony the allegations of his bill. (p. 627).

2. SALE—*Conditions—Forfeiture—Damages.*

S. purchased of A. seven-eighths of the undivided one-half interest of A. in the oil in and under two hundred and forty-three acres of land, and paid three hundred dollars cash therefor; and, as part of the terms and conditions of sale, S. was to begin to operate, mine, and bore for oil and gas within and under said tract of land, free of cost to A., within sixty days, and complete one well thereon in one year, unavoidable delay and accidents excepted; and, if oil be found thereon in paying quantities, then, after the said first well was completed thereon, S. should immediately commence and drill other wells thereon as should seem necessary to protect the oil and gas in and under the said tract of land, and should also deliver as royalty to the credit of A., free of cost to him, the one-half of the one-eighth of all the oil produced and saved from the said land, in pipe lines or tanks, and pay to him the one-half of three hundred dollars per year for the gas from each and every well drilled thereon, producing gas, the product from which should be marketed. *Held*, that the remedy for violation of said conditions of the sale is not by way of forfeiture of the rights of S. to bore or drill for oil on the land or any part of it, but by an action or proceeding for damages caused by such breach. (p. 629).

Appeal from Circuit Court, Monongalia County.

Suit by Howard L. Ammons and others against the South Penn Oil Company and others. Decree for plaintiffs, and defendant oil company appeals.

Reversed.

M. F. ELLIOTT, U. N. ARNETT, JR., and A. B. FLEMING, for appellant.

COX, & BAKER for appellees.

MCWHORTER, PRESIDENT:

Daniel Conaway, of Monongalia County, devised to his daughter, Armina Ammons, for the term of her natural life, and at her death to her children (subject however, to a life estate therein, which he devised to his wife, Malinda), a tract of two hundred acres of land in said county, which, on being surveyed, proved to contain two hundred

and forty-three acres. On the 17th day of March, 1891, Malinda conveyed by deed of that date her life estate in said tract of land to her son-in-law, Milton A. Ammons, and her daughter, Armina Ammons, his wife, in consideration of natural love and affection, and the further consideration that the vendees would comfortably support, care for, maintain, and clothe the vendor during the remainder of her life, and give her a decent burial at her death, and erect or cause to be erected over her grave a monument as near like the monument then over the grave of her late husband, Daniel Conaway, as it was possible to get, and retained a lien on said estate so conveyed to secure the comfortable support, caring for, maintenance, and clothing, which was a part of said consideration. By deed of date 27th of May, 1889, said Milton A. Ammons and his wife, Armina Ammons, leased for oil and gas purposes the said tract of two hundred and forty-three acres, in connection with adjoining lands, making in all three hundred acres, more or less, to Charles J. Ford, for the term of five years from the date of the lease, and as much longer as oil or gas should be found in paying quantities, which lease was by Charles J. Ford, by a writing, duly signed and acknowledged, dated July 17, 1889, assigned to the South Penn Oil Company, which lease and assignment were admitted to record in the clerk's office of the county court of said Monongalia County. On the 17th of February, 1892, M. A. Ammons, guardian of Howard L. Ammons, Clarence L. Ammons, Ashley Ney Ammons, Cyrus C. Ammons, Stella M. Ammons, Millard R. Ammons, Early F. Ammons, and Ernest H. Ammons, the infant children of said Armina Ammons, filed his petition in the circuit court, under chapter eighty-three, Code, naming the said infants and the said Armina Ammons, Milton A. Ammons, Malinda Conaway, Charles J. Ford, and the South Penn Oil Company, a corporation, as defendants, and asking for such proceedings as would authorize him to make sale or dispose of the interest of the said infant defendants in their estate in remainder in the undivided seven-eighths of the oil as well as the gas which might be under the said tract of two hundred and forty-three acres of land, together with the right and privilege of the purchaser to enter upon

said tract of land and operate for oil, etc., and for general and special relief. It was ascertained by proper proceedings therein that the infant defendants, children of the said Armina Ammons, who had an estate in remainder in said tract of land, should have and be seised of an estate in *praesenti* of an undivided one-half interest in all the gas and oil in and under the said tract of two hundred and forty-three acres of land; and the court, being of opinion that such division was proper, appointed Charles Powell a special commissioner to sell at either public or private sale the interest of said infants in and to the seven-eighths of the oil and gas, with all proper privileges for producing and securing the same. Said special commissioner made sale of same for the sum of three hundred dollars in cash to the South Penn Oil Company, in addition to paying all the costs of the proceeding and the cost of conveying the same, which sale was confirmed, and Charles Powell appointed special commissioner to convey the same to the South Penn Oil Company, which he did by deed dated February 18, 1892. It is provided in said deed "that, as a part of the terms and conditions of the said sale, the purchaser of the said interest and rights and privileges shall do and perform the following, to wit: To begin to operate, mine, and bore for oil and gas within and under said tract of land free of cost to the said infants or their guardian, within sixty days after the confirmation of the sale hereunder, and complete one well thereon in one year after said confirmation, unavoidable delay and accidents excepted; and, if oil be found thereon in paying quantities, then after the said first well is completed thereon the said purchaser shall immediately commence and drill other wells thereon as shall seem necessary to protect the oil and gas in and under the said tract of land, and shall also deliver as royalty to the credit of the said infants or their guardian, free of cost to them or their guardian, the one-half of the one-eighth of all the oil produced and saved from the said land, in pipe lines or tanks, and pay to the said infants or their guardian the one-half of three hundred dollars per year for the gas from each and every well drilled thereon, producing gas, the product from which is marketed or used off the said premises, and also pay all the damages to

the growing crops by reason of operations. And this conveyance is made on the terms and conditions and subject to the requirements and restrictions of said decrees only. Reference is here made to the said will of record as aforesaid, and to the said decrees and papers in the said cause or proceeding aforesaid, for a full and more perfect description of either said tract of land, and the said oil and gas interests, rights, and privileges, and the terms and requirements of the said decrees."

On the 28th of August, 1895, the said Howard L. Ammons and the other seven named children of Armina Ammons, all infants, by Milton A. Ammons, their next friend, sued out of the clerk's office of the circuit court of Monongalia County their subpoena in chancery, and filed their bill against the South Penn Oil Company, a corporation organized and existing under the laws of Pennsylvania, and Charles Powell, special commissioner, defendants, alleging that the said tract of two hundred and forty-three acres of land is located in what is known as the Doll's Run and Mannington oil field or belt; that the oil is found in said field or belt in a porous sand rock stratum; that, at the time of entering the proceedings and the decrees selling said defendant the seven-eighths interest of plaintiffs in said oil and gas, said land was practically tested and very valuable oil territory, and the same, if it had been properly and fairly developed, and the oil and gas thereunder properly and fairly protected by the drilling of such wells as seemed and were necessary, was worth several hundred thousand dollars for oil purposes; that the defendant oil company is very largely interested and engaged in the oil business in said field or belt, and owns leases for oil and gas purposes on many thousand acres in said belt, and near thereto, and owns and operates very many producing oil wells in said belt, by means whereof it has a very large production of both oil and gas,—and filed with their bill a map, as Exhibit ten, showing the tract accurately, and the courses and distances; alleging that said defendant is the owner of leases for oil and gas purposes on all the lands adjacent and adjoining said tract of two nundred and forty-three acres, and has developed or partially developed said adjacent territory and leases; that, owing to

the nature and porous character of the oil-producing sand rock in that field or belt, a well drilled to that rock will drain and produce the oil from a considerable distance around or away from the place where the well is drilled in the rock, and a number of wells drilled around and close to a given tract of land, such as the said two hundred and forty-three-acre tract, will drain the oil and gas or the greatest part of them from such tract, and leave it practically valueless for oil purposes, unless wells are drilled and operated on such tract in such proximity to the lines thereof as will protect the oil and gas under the same, and prevent the same being drained by the wells of adjoining tracts; alleging that defendant had drilled wells on the adjoining tracts near the line of the tract in controversy, and did not drill wells on said tract opposite thereto, to protect the lines thereof against the drainage of such wells on the adjoining tracts, as it was required to do under the provisions of its deed; that, up to the time of the commencement of this suit, defendant had not drilled a sufficient number of wells on the tract to remove the oil from the land within a reasonable time, and to protect the lines of said tract against drainage to the wells drilled by defendant on the adjacent tracts; that, to have protected the oil and gas in said tract as was its duty to do, at least thirty wells should have been drilled on said tract, while only about one-half that number had been drilled; that the conditions, terms, requirements, and restrictions contained in the decrees authorizing the sale of plaintiffs' interest, and in the deed conveying the same to defendant, in relation to protecting the oil and gas under said tract of land, were intended and meant to protect the interests of the infant plaintiffs therein, and their royalty, as it would be no pecuniary loss to the defendant company to drain and draw the oil and gas out of and from the said tract of land by means of wells on adjacent lands, and would probably be a saving in the expense of drilling such wells on said tract, as it was required by the said decrees and deed, especially as said defendant company is the owner and operator of the leases and said wells on the adjoining lands, and that for some reason, either of pecuniary interest or otherwise, the defendant had knowingly and wrongfully permitted said tract

to remain unprotected and undeveloped, and had willfully and wrongfully discriminated against plaintiffs and their said royalty interest in the oil and gas in and under said tract of land, and was continuing to do so, to their great prejudice, and, that, in consequence of the failure of defendant to comply with the terms of the decrees and the deed, the plaintiffs had sustained damages to the amount of twenty-five thousand dollars; that about the time of the commencement of the suit the plaintiffs had filed an affidavit, and sued out an order of attachment against the property of said defendant company, which order was placed in the hands of the sheriff of the county to be executed, by which order the sheriff was commanded to attach property of the said defendant sufficient to satisfy the said sum of twenty-five thousand dollars claimed by plaintiffs and the costs; that at the time of suing out said attachment, and ever since that time, the said defendant was and is a foreign corporation; and that, by reason of the several premises stated, plaintiffs were entitled to recover the said sum of twenty-five thousand dollars damages from said defendant, and to have its property located in Monongalia County attached and sold, according to law, to satisfy their said claim; and aver that defendant is seised and possessed of very much valuable property, both personal and real, in said county, which was liable to the levy of said order of attachment; and pray that they may recover of and from said defendant the said sum of twenty-five thousand dollars damages and costs: that the property of said defendant liable to attachment be made liable to the satisfaction of the decree and costs of suit, and all interlocutory decrees and orders be entered as may be necessary to enable plaintiffs to recover, etc., and for general and special relief.

At rules held in the clerk's office of said court on the first Monday in October, 1895, the defendant appeared and filed its plea in abatement to the attachment, averring that at the time of the suing out of the attachment, and for a long time before and since, the defendant was a corporation duly incorporated by the laws of the commonwealth of Pennsylvania, one of the states of the United States, and that prior to the suing out of said attachment the defendant did file with the secretary of state of the State of West

Virginia a copy of its articles of corporation, and of the law and authority, etc., and that, having complied with the law in everything required by the statute of foreign corporations, therefore the grounds stated and contained in the affidavit upon which said attachment was founded did not exist at the time said affidavit was made and at the time said order of attachment was issued, and had in fact no existence, to wit, "that he, the affiant, believes the defendant, the South Penn Oil Company, is a foreign corporation," which plea was verified. Defendant filed its demurrer and answer; does not admit, and called for strict proof of, the allegation of the bill that, owing to the nature and porous character of the oil-producing sand rock in that belt or field, a well drilled to that rock would drain and produce the oil for a considerable distance around or away from the place where the well is drilled in the rock, and that wells drilled around or close to a given tract of land, such as the tract aforesaid, would drain the oil and gas, or a greater part of each, from such tract of land, and leave it practically valueless for oil purposes, unless wells be drilled and operated on such tract in such proximity to the lines thereof as would protect the oil and gas under the same, and prevent the same being drained by the wells on adjoining tracts; avers that it commenced to drill on April 18, 1892, and completed on July 19, 1892, a well which produced twenty-five barrels per day, and immediately on its completion began the drilling of other wells on said tract, and drilled sixteen wells thereon, fourteen of which were producing wells, and the other two were dry; that, from the time of the commencement of said first well, defendant had prosecuted the drilling of oil wells on said tract continually, without interruption, up to the 2d day of September, 1895, when the last well was completed, except that between the 29th of September, 1893, and the 23d of October, 1893, less than a month, when work on the drilling was suspended; that defendant had drilled as many wells on said tract as good business operations required; that its operations were in all respects in conformity with the business of producing oil, and had fairly protected and did protect the rights of plaintiffs, so far as they were the owners of the land; denied all allegations of the bill which

directly or indirectly charged that it was required to bore any wells on said land which were not bored, or do anything in the way of boring wells or otherwise to protect said land which was not done; admits boring the Toothman wells, numbers one and two, on the adjoining land of Daniel Toothman, but avers that, in order to protect plaintiff's interest, defendant located and drilled a well near the line of the Toothman land, between about the same distance from the line that the Toothman wells were located, which was completed September 2, 1895, and was dry, and it was bored at an expense of not less than eight thousand dollars, which was a total loss to defendant, and was all the well that should have been or should be bored opposite or near said Toothman wells or line; admits drilling wells on adjoining lands, but denies that such wells drain the oil and gas from plaintiffs' land, thereby greatly reducing the value thereof; that such wells as were drilled by it on adjoining lands were drilled lawfully under contracts of lease of said lands, and that it had done all things required of it by the deed and decrees; and denies all allegations charging defendant with wrongfully and unjustly failing and refusing to drill such wells on said land as were necessary to protect the oil and gas thereunder; that the oil and gas under the land remained unprotected, unproduced, and undeveloped; and avers that the sixteen wells located and on plaintiff's land were located and drilled upon what was supposed and deemed to be the most productive and valuable part of the said tract for oil and gas purposes, and also with a view to the development of the said tract for oil and gas purposes, and of obtaining all the oil possible therefrom, and the promotion of the interests of the plaintiffs as well as the interests of the defendant; and filed a map showing the location of the sixteen wells, Exhibit XX; and avers there are more wells drilled for oil and gas upon plaintiffs' land than upon all the tracts adjacent or adjoining thereto, and that more oil has been produced and is being produced from the wells upon plaintiffs' land than from the wells upon several adjacent tracts; denies that it was necessary to drill at least thirty wells on said tract in order to protect the oil and gas from being drained and taken off by wells on adjacent lands; denies any loss or damage

to plaintiffs, as alleged, by reason of failure of defendant to drill the wells plaintiffs claim it should have drilled on said land; and denies that defendant was at the time of suing out the attachment, and is and was, a foreign corporation, and liabel to be attached as such; and denies the right of plaintiffs to sue out an attachment against defendant; and denies the existence of grounds on which said attachment is founded; and avers that at the time of suing out the order of attachment, and long before, the defendant was a corporation duly incorporated under the laws of the commonwealth of Pennsylvania, one of the states of the United States; that prior to the suing out of said attachment, it filed with the secretary of state of West Virginia a copy of its articles of incorportion, and of the law and authority under which it was incorporated, and the secretary of state, in pursuance thereof, issued a certificate of that fact, which certificate was, before the suing out of said attachment, filed and recorded in the clerk's office of the county court of Marion County, West Virginia, one of the counties in which its business is conducted; and filed with its answer copies of such articles, certificate, etc., as exhibits; and avers that it had fully complied with section 30, chapter 54, Code, and all other statutes on the subject, and had accepted of the provisions of said chapter, and is therefore entitled to the rights, powers, and privileges, and subject to the same regulations, restrictions, and liabilities, that are conferred and imposed upon corporations chartered in the State of West Virginia, under the laws of West Virginia; and avers that it is, as to all its transactions in the State of West Virginia, including all its contracts, a domestic corporation, and not liable to attachment in the State as a nonresident or foreign corporation; and denies the right of plaintiffs to maintain this suit in a court of equity, and the right of the court to grant the relief prayed for by plaintiffs; and prays that the attachment issued and levied in this cause be abated and quashed, and plaintiffs' bill be dismissed, and that it recover its costs, etc.

On the 26th of October, 1895, the cause was heard upon defendant's motion to quash the attachment, and plaintiff's objection to the defendant's plea in abatement and motion to reject said plea, upon plaintiffs' exceptions indorsed

upon defendant's answer, and upon defendant's demurrer to the bill, and the court took time to consider. The parties also filed a statement of the run of oil from the Ammons and other farms, furnished by defendant, to be used by plaintiffs, if competent testimony for them, and as though they had made the proof in the ordinary way. The statement of runs of oil from the tanks into the pipe lines from the respective wells named in statement begins with and shows seven-eighths of the first run from the respective wells after completion, and all the seven-eighths oil run therefrom prior to 29th of October, 1895; that the wells designated "M. Ammons" are on the two hundred and forty-three acres; that the well designated "Armina Ammons" is the well alleged in the bill to be on the lands of Milton A. Ammons, adjoining the two hundred and forty-three acres; that all the other wells shown in the statement are wells referred to in the bill, on lands adjoining the two hundred and forty-three acres. On the 20th of June, 1896, the cause was heard on the bill, the separate answer of the corporation defendant, general replication thereto by plaintiffs, affidavit, and order of attachment, plea in abatement to said attachment, motion of plaintiffs to reject said plea, defendant's motion to quash the attachment, defendant's demurrer to plaintiffs' bill, and joiner therein by plaintiffs, and depositions taken and filed in the cause, when the court rejected the plea in abatement and dismissed the plea, overruled the motion of defendant to quash the attachment and the demurrer to the bill, and on motion of defendant all other questions were reserved for the future determination of the court. On the 21st of October, 1896, on its motion, the defendant corporation was granted leave to file in the papers within twenty days from that date an amended answer to plaintiffs' bill; and leave was granted plaintiffs to except or reply thereto, or make such defense thereto as they might deem proper. Such amended answer was filed, averring that Exhibit XX, filed with the original answer of defendant, therein stated to be perfect, showing the correct description of the lands in the bill described, and the correct location of the oil and gas wells therein, was not, in several particulars, a correct map, and did not show the correct location of all the wells on the

land, or of those on the adjoining lands, and proceeded to give such correct locations, and filed Corrected Map XX as an exhibit with the amended answer. On the 11th of February, 1897, plaintiffs asked to submit the cause upon a motion to refer the cause to a commissioner to ascertain the damages to which plaintiffs were entitled, which motion the defendant resisted, and moved that the cause be continued, to give it the opportunity to take additional testimony, and filed the affidavit of N. F. Clark, vice president of the defendant corporation, in support of its motion; and plaintiffs filed the counter affidavits of Frank Cox and George C. Baker, and the court continued the case. On the 15th of June, 1897, defendant filed with its answer and amended answer Exhibits W, Z, Y, X,—papers and documents purporting to show that it had complied with the statute requiring it to appoint an attorney in fact to accept service, etc,. and filed in the office of the secretary of state a copy of its charter, and of the laws of the state under which it was incorporated,—copy of the charter, etc., and that it had filed and had recorded it in the clerk's office of Marion County court, and had complied with section 30, chapter 54, Code; and the defendant tendered its plea in abatement to the attachment issued in the cause, to the filing of which plaintiffs objected, and moved the court to reject the plea, and the court sustained the motion and rejected the plea in abatement; and the defendant filed "additional exceptions" to depositions of plaintiffs, and renewed its exceptions taken and noted when the depositions were taken. On the 10th day of February, 1898, defendant tendered in open court its second amended and supplemental answer to plaintiffs' bill, alleging necessary additional parties, to which answer plaintiffs excepted and objected to the filing thereof. The court overruled the objection to the filing, and the answer and exceptions thereto were made a part of the record in the cause. Said answer avers that defendant had just learned, on the —— day of February, 1898, that there were not proper and necessary parties to this suit, and should the pretensions of plaintiffs be sustained by the court, and defendant made liable for damages as claimed by plaintiffs, great injury might and perhaps would result to defendant, unless the

court required that such additional persons be made parties; that one day, the week before making the answer, defendant learned that within the then past few months an additional child had been born to Armina Ammons and Milton A. Ammons, and, on inquiry to learn the sex and name of the child, ascertained that it was born on the ——— day of last September, and was named Willie Vetis Ammons, and also that not only, in addition to the eight plaintiffs, said Willie Vetis had been born to said Armina and Milton A. Ammons, but that two other children, named Ollie Cecil, then aged four years, and Carlie Ross, then aged two years, making three children of the said Armina and Milton A. Ammons, all living, who were not parties to the suit, and who were necessary parties thereto; that two of said children were born long before the institution of this suit, and there could be no valid reason why they were not made parties at the time of filing the bill.

On the 21st of February, 1898, the cause was heard upon the bill and exhibits, the answer, amended answer, and second amended and supplemental answer, exhibits, replications to said answers, upon the depositions (except that of E. B. McGara, which was withdrawn), the objections and exceptions of plaintiffs to depositions and questions and answers, in so far as objections or exceptions were taken by plaintiffs, and upon the objections and exceptions of the defendant corporation to the depositions of plaintiffs taken and filed in the cause, and to the questions and answers therein contained, in so far as objections or exceptions have been taken by defendant, and upon the statement of the runs of oil filed under agreement of counsel; and, it appearing that plaintiff Howard L. Ammons was past the age of twenty-one years, the cause was ordered to be prosecuted in his own name, and he appeared by counsel, assenting thereto; and, on motion of plaintiffs, Armina Ammons and Milton A. Ammons, her husband, in his own right, were made parties defendant to the suit, and appeared by counsel, and waived process or other further notice therein, and consented to being made parties defendant therein, to which motion defendant corporation objected, and excepted to their being made parties defendant which objection was overruled, and all objections and exceptions to depositions

and to questions and answers were overruled, and the defendant corporation was enjoined from setting up claim or maintaining any right, title, or claim for oil and gas purposes under and by virtue of the deed from Special Commissioner Charles Powell, mentioned and referred to in plaintiffs' bill, and from drilling, occupying, or operating for oil and gas in and upon the four lots of land, parts of the two hundred and forty-three acres mentioned in plaintiffs' bill, as shown and laid down by metes and bounds on the plat filed as Exhibit XX with the original answer of defendant South Penn Oil Company, by George W. Johnson, surveyor of the county, "under the order of the court now made," which lots are numbered one, two, three, and four, respectively, set forth by metes and bounds in the report of said Johnson, in writing, dated February 14, 1898, filed as an exhibit, marked "GWJ;" the metes and bounds of the said several lots being given in the decree. The injunction to be in effect unless the South Penn Oil Company should within ten days from the entering of the decree file in the cause a declaration stipulating that it would begin to drill within twenty days from the same date a well for the production of oil, and thereafter prosecute and complete the same with all reasonable diligence, and in good faith, to the depth required for the obtaining of the oil in the Big Indian sand upon said lot No. 2, and, if it fail to do so, its rights and privileges for oil and gas upon said lot No. 2 shall be taken and deemed to be abandoned by it. The same provision was made as to lot No. 1, except the stipulation was to be filed within twenty days, and drilling begun within sixty days; and, as to lot three, stipulation to be filed within thirty days, and drilling begin within ninety days; and, as to lot No. 4, stipulation to be filed within forty days, and drilling to begin within one hundred and twenty days,—all from the date of entering the decree; "and, on failure to prosecute the work on each of said lots as set forth touching lot No. 2, the abandonment of the respective lots will be deemed to have taken place by defendant at the times mentioned, respectively." The decree provided that the restraining and enjoining order should not apply to any one or more of said four lots as to which the defendant South Penn Oil Company should

fully comply with the provisions of the decree made in relation thereto, and that nothing contained in the decree should in any wise effect the rights, privileges, and requirements of said defendant as to the residue of said tract of land not included in the boundaries of said four lots; and referred the cause to I. G. Lazzell, a commissioner in chancery, to ascertain and report: "First, what amount of damages, if any, the plaintiffs have sustained by reason of the failure of the defendant South Penn Oil Company to immediately commence and drill such wells for oil and gas on the said tract of land mentioned in plaintiffs' bill * * * after oil was found thereon by the defendant South Penn Oil Company in paying quantities, as seemed necessary and proper to protect the oil and gas in and under the said tract of land; second, anything deemed pertinent by said commissioner, or specially required by any of the parties in interest in this suit;" and leave was granted either party to retake the depositions of any witness or witnesses whose depositions had been taken in the cause, if they so desire, and to take any other proper evidence, either before said commissioner or in the cause, but if not taken before the commissioner, the same should be taken upon proper and legal notice, from which decree the defendant South Penn Oil Company appealed.

Appellant insists that the court erred in rejecting its plea in abatement to the attachment; that the defendant corporation, having complied with section 30, chapter 54, Code, to enable it to do business in this State, and with all other statutes concerning foreign corporations, so far as same could apply to defendant, was entitled to immunity from the harsh proceeding of attachment, and to be placed upon the same footing as domestic corporations, and its plea should have been filed, and not rejected. The provisions of section 30, are simply conditions precedent to the right of foreign corporations to do business in this State, and do not convert such corporations into domestic corporations, as has been frequently held by this Court (*Quesenberry* v. *Association*, 44 W. Va. 512, (30 S. E. 73), and cases therein cited; and, being foreign corporations, they are liable, under chapter 106, Code, to attachment.

Appellant contends further that its demurrer to the bill

should have been sustained for want of jurisdiction. The principal object of the suit appears to be to enforce a claim for damages for a wrong, for draining the oil and gas from the premises in question, and producing the same through wells drilled on lands adjacent to plaintiffs' land. Our statute provides (section 1, chapter 106, Code) that such attachment "may be sued out in a court of equity for a debt or claim, legal or equitable, whether the same be due or not, upon any of the grounds aforesaid," etc. It is contended by appellant, however, that this statute is in violation of the constitution, which provides, in Article III., section 13, that "in suits at common law where the value in controversy exceeds twenty dollars, exclusive of interest and costs, the right of trial by jury if required by either party shall be preserved." This question has been settled in this State in *McKinsey* v. *Squires*, 32 W. Va. 41, (9 S. E. 55), (Syl., point 1), where it is held, "Our statute (Code 1887, chapter 106, section 1), which provides that an attachment may be issued out in equity for the recovery of damages for a wrong, is constitutional," and in *Cecil* v. *Clark*, 44 W. Va. 659 (30 S. E. 216), (Syl. point 3), "Where already at the time of the adoption of the Constitution, equity exercised jurisdiction in certain matters, the clause of the constitution guarantying jury trial does not relate to such matters, or deprive equity of jurisdiction therein, to act without a jury." Cooley, Const. Lim. 504; Sedg. St. & Const. Law, 486, 488; *Steamboat Co.* v. *Roberts*, 48 Am. Dec. 186, 188. Appellant contends (and that too, with a great deal of force and reason) that, by extending equity jurisdiction to claims of this character, parties are deprived of trial of their rights by jury. The truth is (and I give it only as my individual opinion) that a non-resident or foreign corporation defendant, by the proceeding in equity by attachment against such defendant, may in all cases be deprived of his right of trial by jury, under our decisions, notwithstanding the constitutions of the State and of the United States, simply because of non-residence. The reasoning of the learned judge who prepared the opinion in *McKinsey* v. *Squires* is not very clear or satisfactory. He says: "But assuming that the legislature has not the power to deprive a party of the right of trial by jury by

simply changing the form of action, and giving a court of equity jurisdiction over a purely legal demand, the question still remains, does this statute deprive a party of a trial by jury? We have a statute which provides for a trial by jury in any chancery case, where there is a conflict of evidence, 'or an inquiry of damages.' Code 1887, chapter 131, sections 4, 5." He concludes that, as the appellant could have had trial by jury if he had required it, therefore he did not think the statute unconstitutional. Section 4, referred to, provides that in a pending chancery cause, in which there is such a conflict in the evidence as, in the opinion of such court, to render it proper, it may direct an issue thereon to be tried in such court or in any other circuit court. This could be done on the suggestion or motion of either party, if the court chose to grant it, but it is evidently entirely in the discretion of the court whether the issue is directed or not; and when it is so directed, and the court should see proper to set aside the verdict, it is not permitted, under the statute, to grant a new trial. The only object of such trial is to enlighten the conscience of the court. Is that such provision for trial by jury as is contemplated by the constitution? Can a party demand and have a jury as a matter of right? The same section provides that "no issue out of chancery shall be directed in any other case," and then provides further that nothing in the section contained shall be construed to conflict with chapter 77, Code. The provision for "an inquiry of damages" contained in section 5, referred to in said case of *McKinsey* v. *Squires*, can only be had in a case "other than a chancery case," as stated in the section. When we consider the immense mass of evidence taken in the case at bar, and the conflict therein, it would seem that the court would gladly have accepted the aid of the jury, if requested by either party to the suit, and directed an issue, but it does not appear that either party required such trial; and can appellant complain, not having asked for a jury?

Appellant says the court erred, in that, if it had jurisdiction under the allegations contained in the bill, the claim being a purely legal one, and there being no accounts to be stated, if the court was of opinion that under the facts as they appeared, and the law governing them, the plaintiffs

were entitled to recover, it should not have referred the cause to a commissioner in chancery, with power to take additional testimony, but should have determined the cause, and entered a final decree upon the testimony already taken. The prayer of the bill is that the plaintiffs recover of and from the defendant South Penn Oil Company the sum of twenty-five thousand dollars damages; that, upon a hearing of the cause full and complete justice be done between the parties; and that such other relief, both general and special, be granted to the plaintiffs as to the court may seem proper, etc. The recovery of the twenty-five thousand dollars for damages sustained by appellees by reason of the alleged failure of appellant to drill as many wells as seemed necessary to protect the oil and gas under the tract of land in question is the only relief specifically asked for in the prayer of the bill. What is involved, of which the commissioner could take an account? Sections 1, 3, chapter 129, Code, indicate the purpose for which commissioners are appointed. In *Tilden* v. *Maslin*, 5 W. Va. 377, JUDGE BERKSHIRE, in rendering the opinion of the Court, on page 378, says: "It was insisted in the argument here that an account should have been ordered by the circuit court, to enable the appellant Tilden to establish his alleged set-off and account against Seymour. But the uniform doctrine of courts of equity is that it is improper to order an account merely to afford a party an opportunity to establish by testimony the allegations of his bill,"—the last sentence of which is the syllabus of the case; and *Lee County Justices* v. *Fulkerson*, 21 Grat. 182, is cited with approval; and *Livey* v. *Winton*, 30 W. Va. 554, (4 S. E. 451), (Syl., point 7), is to the same effect: "It is improper to order an account merely to establish by testimony the allegations of the bill." See, also, 3 Pom. Eq. Jur. § 1421. There are no matters of account in case at bar to refer to a commissioner,—nothing upon which he could decide.

Appellant contends that the court erred in decreeing that lots Nos. 1, 2, 3 and 4 should be taken and decreed to have been abandoned by the defendant and forfeited by it unless within a certain number of days such wells should be commenced on the lots, respectively, as set

out in the decree, and the work diligently prosecuted, and that the court erred in granting the plaintiffs relief which was not germane to the bill, and which could not be granted under the allegations and the prayer of the bill; i. e. the forfeiture of the rights of appellant to said certain portions of said land designated as lots 1, 2, 3, and 4. The appellees rely upon the case of *Kleppner* v. *Lemon*, 176 Pa. St, 502, 35 Atl. 109, to support their decree, requiring appellant to drill wells on the said four lots, or forfeit its rights therein. That was a case, under an ordinary gas and oil lease, where, until oil was found in paying quantities, the only right the lessee had was the exclusive right to explore and drill for oil and gas for a given time. When the oil was found in the quantities named, the lessee had a vested estate in the oil, and implied covenants on his part to drill such further wells as seemed necessary to develop and protect the property. In a case recently decided by the Supreme court of Pennsylvania (not yet reported) Justice Mitchell, in the opinion, says: "This is a bill in equity against lessee for specific performance of covenants, or, in the alternative, for forfeiture of the lease and also for an account. As the covenants are merely implied, and their extent depends altogether on oral evidence of opinions, the case for relief is wholly wanting in that precision and certainty of contractual duty which is necessary to sustain the ordinary chancery decree for specific performance. The jurisdiction of equity in a similar case, was, however, sustained in *Kleppner* v. *Lemon*, 176 Pa. St. 502, 35 Atl. 109, and we do not now propose to question it. But that decision was on the ground of fraud, the majority of the court being of opinion that the defendant was fraudulently evading his obligations to plaintiff while draining the oil from plaintiff's land through wells on adjacent territory. 'The findings show,' says Williams, J., 'that it is the expressed purpose of the defendant to secure Kleppner's oil through his wells on the Garlach and Stotler tracts of land.' The basis necessary to sustain the bill, therefore, is fraud, and that, of course, must be affirmatively and clearly proved." In the case at bar appellant was the absolute owner of seven-eighths of plaintiffs' interest in the oil, having purchased and paid for

the same, and which was conveyed to it; and a part of the consideration of the purchase was that it should "begin to operate, mine, and bore for oil and gas within and under the said tract, free of cost to the said infants or their guardian, within sixty days after the confirmation of the sale; * * * and, if oil be found thereon in paying quantities, then, after said first well is completed thereon, the said purchaser shall immediately commence and drill other wells thereon, as shall seem necessary to protect the oil and gas in and under the said tract of land." Appellees insist that it has violated the conditions and terms of the deed under which it holds, in that it has not drilled a sufficient number of wells to protect the oil and gas in and under the land in question against drainage from wells drilled by appellant on adjoining lands; that it has discriminated unfairly against plaintiffs in developing the adjoining lands; that it has drilled but sixteen wells upon said tract, when it should have drilled at least thirty. If this be true, is the appellees' remedy by forfeiture of appellant's rights in the oil and gas in such parts of the land as are not properly protected? The remedy is by an action for damages caused by such breach of conditions of the deed or failure of duty. *Harris* v. *Coal Co.*, 57 Ohio St. 118, 48 N. E.502. In that case it is held that "a breach of the implied covenant to reasonably develop and protect lines does not have the effect to forfeit the lease, in whole or in part; nor is it good cause for a court to declare such forfeiture, unless the lease, in express terms, provides that a breach of such implied covenant shall avoid or forfeit the lease." Koch & Balliet's Appeal, 93 Pa. St. 434; *McKnight* v. *Kreutz*, 51 Pa. St. 232; *Janes* v. *Oil Co.*, 1 Penny. 242; *Blair* v. *Peck*, *Id.* 247; *Paschall* v. *Passmore*, 15 Pa. St. 295. In the case at bar there is no forfeiture clause for failure to develop or protect the premises. It is a question of good faith on the part of appellant. It is provided that, when oil is found in paying quantities, appellant shall immediately commence and drill other wells thereon as shall seem necessary and proper to protect the oil and gas in and under said land, which primarily means "which seem necessary" in the good, honest, business judgment of the appellant. *Kleppner* v. *Lemon*, before cited. If this is done in good faith,

it cannot be held liable; and, as is held in *Colgan* v. *Oil Co.* (Pa. Sup.) 45 Atl. 119: "It is only when the wells on adjoining territory are being fraudulently used to drain the complainant's land that courts have any occasion to interfere. The practical test is to be found in the question, are the outside wells draining plaintiffs' wells to such an extent that, if the former were operated by a third party, the defendant, as lessee of the latter, would find it good management to put down another well to save its own leased territory from exhaustion? If so, then good faith to its lessor would require it to put down the additional well, that the lessor might get his proper royalty. But, if not, the latter has no cause of complaint. If plaintiff, as owner, would not find it profitable to put down another well to stop his neighbor's drainage of his land, the lessee cannot be held to any higher obligation. He is not bound to work at his own loss for his lessor's profit." The same opinion further says: "So long as the lessee is acting in good faith on business judgment, he is not bound to take any other party's, but may stand on his own. Every man who invests his money and labor in a business does it on the confidence he has in being able to conduct it in his own way. No court has any power to impose a different judgment on him, however erroneous it may deem his to be. Its right to interfere does not arise until it has been shown clearly that he is not acting in good faith on his business judgment, but fraudulently with intent to obtain a dishonest advantage over the other party to the contract. Nor is the lessee bound, in case of difference of judgment, to surrender his lease, even *pro tanto*, and allow the lessor to experiment. Lessees who have bound themselves to covenants to develop a tract, and have entered and produced oil have a vested estate in the land which cannot be taken away on any difference of judgment. It is not within the jurisdiction of any court to oust the owner and forfeit the title to estates in that way, and the jurisdiction of equtiy to decree any specific act or declare forfeiture depends on fraud averred and fully proven."

The defendant entered exceptions to the depositions of plaintiffs as they were being taken, to questions and an-

swers as they were entered, and also filed special exceptions, all of which exceptions, as well as those taken to the depositions of defendant by plaintiffs while they were being taken, were overruled by the court, and the depositions were allowed to be read in the cause, in which action of the court in overruling defendant's exceptions appellant insists that the court erred; claiming that testimony to the effect that there is a presumption that oil drains into an oil well equally from all directions in certain character of oil-bearing rock is incompetent and should not be considered; this evidence is speculative, and mere guesswork, especially in territory as "spotted" as that in controversy is shown to be. *Duffield* v. *Rosenzweig*, 144 Pa. St. 520, 23 Atl. 4, was a case in which the lessee of a lease for oil purposes had the exclusive right of boring for oil on a certain tract of land, but was restricted to certain specified sites. While the lessee had no such possession as would support ejectment as to land outside the designated sites, yet he had the protection of the entire leasehold, and equity had jurisdiction to restrain the lessor, or others acting under him, from drilling wells thereon outside the designated sites, and thereby lessening the production of lessee's wells; and it is held, "In such case the damages are not to be measured by the amount of oil taken out of defendants wells so drilled (outside the designated sites), nor by the speculative opinions of operators as to how much of it might have been obtained through the plaintiff's wells, but they may be measured by the difference in the value of the plaintiff's leasehold before and after the injury was commited." Justice Clark, in preparing the opinion of the court in the case, says, "A large part of the testimony introduced upon this subject, it must be concluded, was of the most unsatisfactory character. It was to a great degree fanciful, conjectural, and speculative. The witnesses were asked to state from their experience as oil operators, and their knowledge of the Clarendon sand, from the location of the plaintiff's wells around the mill yard, and the location of the wells of the defendant, what proportion of the oil produced by those three wells during the term of the lease from Burns to Pratt would be taken or could have been taken out through the plaintiff's wells. The esti-

mates ranged from one-third to seven-eighths of the production of the three wells. The testimony shows that the subject is one as to which there is great diversity of opinion. Operators have widely different ideas. * * * It is plain, from a careful reading of the evidence, that the estimates made were mere guesses. * * * It is impossible, we think, to make any estimate of the plaintiff's damages upon this basis which would be even approximately correct. Assuming that this would ordinarily be the proper measure of damages, we are obliged to resort to some other; for, in the very nature of the case, proof upon this basis of assessment is wholly impracticable,—indeed, impossible." This case, after retrial, was again taken to the supreme court (150 Pa. St. 543, 24 Atl. 705), where it was held that "the damages cannot be estimated by the amount of oil which the new wells might drain from the old wells, the proof of damages upon this basis being impracticable, in the nature of the case;" and all questions on the "drainage or suction theory" asked of witnesses, looking to that basis for fixing damages sustained by the plaintiff, were rejected as incompetent evidence.

The objection to the deposition of plaintiff's witness J. G. Samsell, so far as it refers to the drainage of oil to wells outside from the Ammons farm, and to the filing of the map made by the witness purporting to indicate the drainage area on the southwestern boundary of the Ammons farm, should have been sustained. The objection to the evidence of witnesses given as expert testimony, where they have not shown themselves to be experts, should be sustained, but this cannot apply to witness J. G. Samsell, who was a civil engineer of twelve years' experience, and with sufficient experience in the oil fields, in locating the position of wells, and determining the elevation of the sand at the point where said wells were drilled, for the purpose of determining locations for new wells or wells to be drilled; and he shows that he had familiarized himself with the oil-producing rock, etc. A man does not necessarily have to be a thorough geologist to be an expert in matters pertaining to the production of oil, however desirable a knowledge of geology may be. Practical observation alone will make an expert of the man of good common sense in any given line of business.

There are questions to be determined in the cause which should be settled by the court itself, or by directing an issue out of chancery, to be tried by a jury, to ascertain whether any of the conditions or covenants of the deed from Special Commissioner Powell to appellant have been violated, to the prejudice of appellees, and, if so, the damages sustained by them. In *Oil Co.* v. *Blair*, 113 Pa. St. 83, 4 Atl. 218, in an action of covenant,—a case in which the cause of action was the same as the case at bar,—brought by the lessor against the lessee for breach of covenant in refusing to bore any other wells, the instruction given by the trial court to the jury as to the measure of damages for the breach of said covenant, and held not to be error, was as follows: "Ascertain how much more oil the plaintiff ought to have received than he actually did receive, and the value of it during the times when it should have been delivered to him. From this deduct the cost of producing what ought to have been produced at the time, under the circumstances, and with the appliances then known, and add to this remainder the interest on it from the time when the oil ought to have been produced to the present time, and this will be the measure of damages sustained by the plaintiff." This rule, however, cannot apply in case at bar, so far as deducting the cost of production is concerned, because the oil, as provided in the contract, is to be delivered to plaintiffs free of cost.

It is assigned as error by appellant that the court made Milton A. Ammons and Armina Ammons parties defendant to the suit after the cause had been submitted, and without filing an amended bill. Appellant objected to the action of the court in so making them parties. They were entitled to one half the royalty in the oil produced, while plaintiffs were entitled to the other half. They should have been made parties plaintiff, instead of defendants, and could not properly be made defendants in any case without an amended bill filed for the purpose, showing what interest, if any, they had in the subject-matter in controversy. For the reasons herein stated, the decree of the circuit court is reversed, and the cause remanded for further proceedings to be had therein.

Reversed.

CHARLESTON.

LAW v. RICH *et al.*

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Submitted February 5, 1900—Decided March 31, 1900.

1. CORPORATION—*Surrender—Franchise—Dissolution.*
A resolution by the stockholders of a joint-stock company to discontinue its business under section 56, chapter 53, Code 1891, operates as a voluntary surrender of the corporate franchise, and a dissolution of the corporation. (p. 635.)

2. EQUITY JURISDICTION—*Statute.*
Equity has no jurisdiction, except as authorized by statute, to dissolve a corporation. (p. 636).

3. CORPORATION—*Receiver—Bill—Jurisdiction.*
When a dissolution of a joint-stock corporation has been made by resolution of its stockholders, under section 56, chapter 53, Code 1891, if a creditor asks a court of chancery to administer its assets through a receiver or otherwise, the bill must state, as a basis of jurisdiction, the failure of the corporation to provide ample funds to sufficiently secure the debts of the corporation, as required by that section. (p. 637).

4. CESSATION OF BUSINESS NOT DISSOLUTION.
A mere cessation, or suspension, or discontinuance by a corporation of its corporate business, unless by resolution of its stockholders to discontinue business, will not operate as a dissolution of a corporation. (p. 637.)

Appeal from Circuit Court, Ritchie County.

Bill by M. L. Law, against Fred Rich and the Oriole Oil and Gas Company. Decree for defendants, and plaintiff appeals.

Affirmed.

DAVIS & WOODS, for appellant.

SMITH D. TURNER, for apellees.

BRANNON, JUDGE:

M. L. Law, made a lease July 19, 1895, to Fred Rich, of land for oil and gas develoment, which lease was assigned

by Rich to the Oriole Oil and Gas Company, a corporation. Law, claiming that under the terms of said lease some money was due him for rent, brought a suit in equity in the circuit court of Ritchie County against Rich and the said Oriole Company to enforce said debt against certain property owned by that company in Ritchie County. The defendants demurred to the bill and amended bill, assigning as cause of demurrer want of jurisdiction in equity to entertain the suit. The Oriole Oil and Gas Company also answered. The court held that the bill showed no equity, and dismissed the case. Law appeals.

There are several questions of importance in the construction of the lease which it would be proper to discuss if there were jurisdiction in equity, but, as we hold there is not, it is improper to discuss them in this suit, and they are left in-tact now for consideration in another suit properly involving them. This is a suit for money claimed as rent under said lease, purely a money demand, proper for a law court. The only ground upon which the bill predicates jurisdiction in equity is the allegation that "said Oriole Oil and Gas Company resolved to discontinuue its business as a corporation under the laws of this State on the 8th day of February, 1897, a long time after said debt had become payable." At the start I will say that a general equity jurisdiction cannot be appealed to as warrant to dissolve a corporation. "Courts of equity have no general jurisdiction to decree the dissolution of a corporation by a forfeiture of its franchises, and therefore cannot exercise such a power, unless given by statute." 9 Am. & Enc. Law (2d Ed.) 601; 5 Am. & Eng. Dec. Eq 128. Therefore, neither because of any inherent jurisdiction in equity nor because of a discontinuance of its business can equity take jurisdiction of this case. Nothing is pleaded as a ground of jurisdiction except the fact that the corporation had resolved to discontinue its business. Our statute (Code 1891, chapter 53, section 57) provides that not less than one-third in interest of the stockholders of a corporation may, by a suit in equity, obtain a decree of dissolution of the corporation by showing sufficient cause therefor. This is an additional power given courts of equity, but this bill cannot be sustained by that section. What effect has

the mere discontinuance of business by a corporation upon its corporate life? It does not operate alone as a dissolution. Nonuser—total nonuser—of the franchise does not do so. The State must, by a proper proceeding, have an adjudication of the fact of nonuser or misuser of the corporate charter, and of its consequent forfeiture and dissolution, before the life of the corporation ends. *Moore* v. *Schoppert*, 23 W. Va. 282; *Lumber Co.* v. *Ward*, 30 W. Va. 43, (3 S. E. 227); 9 Am. & Eng. Enc. Law (2d Ed.) 563, 574. But it is clear law that the mere suspension or discontinuance of business by a corporation will not destroy its life. The discontinuance or suspension may be temporary, often advisable for the interests of the stockholders. The State may step in, if the public is injured, and take away the charter for such a discontinuance of its business as is misuser or nonuser. Our Code, chapter 53, section 7, tolerates a suspension of business for two years, and declares that a longer suspension shall operate a forfeiture of corporate rights and privileges; says they shall cease. But that forfeiture must be enforced by the State, not by an individual. All this shows that mere discontinuance of business does not alone dissolve a corporation. It does not authorize a creditor to avail himself of jurisdiction in equity to have the assets administered for the benefit of creditors, as in the case of a dissolved corporation. A discontinuance of business does not dissolve, nor even an assignment for the benefit of creditors. 5 Thomp. Corp. §§ 6619, 6664, 6482. We have a provision, however, in Code 1891, chapter 53, section 56, authorizing stockholders in general meeting by resolution of a majority of the capital stock voting for it to discontinue business. What is the effect of such a resolution? Does it merely discontinue the business temporarily? Or is it a final dissolution? It is well-settled corporation law that a corporation may be dissolved by the surrender of its franchises, and this is done, not by the directors, but by a majority of the stockholders. 9 Am. & Eng. Enc. Law (2d Ed.) 546; Cook, Corp. § 629. That is a common-law power. The stockholders—the owners—may give up the boon granted them by surrendering it to the hand that gave the corporate life. I interpret section 56, above referred

to, as a statute declaratory of this common-law power. It is true it uses the words "discontinue the business of the corporation," and does not use the word "dissolve"; and it is true that under the general law a mere discontinuance of business does not dissolve the corporation, as stated above; but I notice that the section has above it the words, "Of the Voluntary Dissolution of a Corporation," which leads me to the conclusion that a resolution passed under that section, by a majority in interest of the stockholders, would operate as the common-law surrender of the franchise, and extinguish the corporation. I notice that the author of the late valuable collection of West Virginia corporation statutes, "Chilton on West Virginia Corporations," is of the same opinion, as indicated by the form of resolution of dissolution (page 87). I understand such to be JUDGE JOHNSON'S opinion in *Pyles* v. *Furniture Co.*, 30 W. Va. 143 (2 S. E. 909). Inasmuch as the statute itself denominates such a resolution a "voluntary dissolution," and provides for the division of the assets after payment of liabilities, I conclude that such a resolution is a surrender and end of the franchise. But this bill does not aver anything but a discontinuance of business. Though it avers that the company resolved to discontinue it, yet it does not say whether the stockholders or directors had adopted a resolution. Only the stockholders could pass such a resolution. A mere cessation of business, without resolution by the stockholders, would not operate a dissolution. The bill does not state the facts clearly and distinctly constituting actual dissolution. If it did, there would be jurisdiction for one creditor to ask the appointment of a receiver to take charge of and administer the assets of the corporation under Code, chapter 53, section 58. Further, the bill does not say that the stockholders passed any resolution of dissolution, without which equity would not have jurisdiction. The most that can be said for the jurisdiction in equity is that the bill means to so charge. This is to ask the Court to presume the existence of such a resolution; but on that hypothesis the bill should go on to say that the stockholders and directors had failed, as required by section 56, to make provision for the payment of debts, for it is only in the event that no such provision

has been made or that inadequate provision has been made, by the stockholders for the payment of debts, that said section 56 allows a creditor to go into chancery. That section contemplates, along with section 58, that it is only when the corporation has failed, upon voluntary dissolution, to properly devote its assets to the payment of debts, that it shall be involved in litigation. Therefore, we affirm the decree, but without prejudice to any party to the cause in any other suit touching the matters mentioned in the record.

Affirmed.

CHARLESTON.

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CASE MANUFACTURING CO. *v.* SWEENY *et al.*

Submitted January 24, 1900.—Decided March 31, 1900.

1. APPEAL—*Amount—Jurisdiction.*
   In determining the question of jurisdiction in an action for the recovery of money on contract, which comes to this Court on appeal to the circuit court, and writ of error, the amount claimed in the summons must determine the question of jurisdiction. (p. 640).

2. UNLIQUIDATED DAMAGES—*Set-off.*
   Unliquidated damages cannot be the subject of a set-off. (p. 641).

Error to Circuit Court, Fayette County.

Action by the Case Manufacturing Company against J. S. Sweeny and others. Judgment for defendants, and plaintiff brings error.

Dismissed.

PAYNE & HAMILTON, for plaintiff in error.

A. P. FARLEY and W. R. LILLY, for defendants in error.

ENGLISH, JUDGE:

A. R. Case and E. N. Case, partners under the firm name of the Case Manufacturing Company, brought a civil action before a justice of the peace of Fayette County, for the recovery of money due on contract, against J. S. Sweeny, W. Sweeny, and John Cregor. Process was served on J. S. Sweeny, and the same was returned "Not found" as to the other defendants. The suit was predicated on a promissory note dated July 16, 1898, executed by J. S. Sweeny and W. Sweeny, and payable September 1st to the order of John Cregor, for eighty dollars. The defendants pleaded payment, and filed specifications of set-off amounting to ninety-six dollars and sixty-nine cents; and thereupon E. N. Case filed his claim for damages against the defendant, J. S. Sweeny, for failing to log timber in compliance with his contract, as a counter set-off. The case was heard, and judgment rendered for the defendant for three dollars and sixty cents. A new trial was awarded by the justice, and on the second trial judgment was given in favor of the defendant for five dollars and costs, and the plaintiff obtained an appeal to the circuit court. On the trial of the appeal in the circuit court the plaintiffs offered in evidence said note for eighty dollars. The defendant filed his set-off of ninety six dollars and sixty-nine cents, and E. N. Case tendered his claim for damages against said Sweeny of four hundred and fifteen dollars and eighteen cents, which was ordered to be filed. The case was submitted to a jury, and resulted in a verdict for the defendant. The plaintiffs moved for a new trial, which was overruled, an exception was taken, and judgment rendered against plaintiffs for costs, and from this judgment the plaintiffs obtained this writ of error.

In considering this case, we encounter at once the question of jurisdiction, which may incidentally involve several of the questions raised by the assignment of errors and the points discussed in the briefs of counsel. Was the amount in controversy sufficient to confer jurisdiction upon this Court? In the summons the plaintiffs asserted that they would demand of the defendants judgment for eighty-one dollars and forty cents, and the set-off filed by

Sweeny amounted to ninety-six dollars and sixty-nine cents, neither of which amounts would give this Court jurisdiction. The plaintiffs obtained this writ of error, and it is incumbent on them to show jurisdiction in the Court to which they resort for relief. In *Stewart* v. *Railroad Co.*, 33 W. Va. 88(10 S. E. 26), this Court held that, "in determining the question of jurisdiction in an action before a justice for a wrong, the amount claimed in the summons, not the damage shown by the testimony, must control." See, also, *Todd* v. *Gates* 20 W. Va. 464. So, also, in *State* v. *Lambert*, 24 W. Va. 399, which was an action before a justice to recover damages for the breach of an official bond, it was held that "the amount of damages alleged and claimed in the summons, and not the penalty of such bond, must be considered, as determining the jurisdiction of the justice." And in *Faulconer* v. *Stinson*, 44 W. Va. 546 (29 S. E. 1011), it is held that "it is the amount claimed by the plaintiff in his declaration or bill, or by the defendant in his plea or answer of set-off, not the amount found due to either, which tests the right to a writ of error or appeal for them, respectively, as regards jurisdiction." Applying these principles to the case at bar, the plaintiffs would certainly not be entitled to a hearing in this Court; the amount demanded in their summons and complaint being only for eighty-one dollars and forty cents.

Is the claim of the plaintiffs for the jurisdiction of this Court improved by the fact that they were allowed to file as a counter set-off the claim of E. N. Case against J. S. Sweeny for four hundred and fifteen dollars and eighteen cents, for damages occasioned by failing to log timber in accordance with his contract? This counter set-off was improperly filed, for several reasons: In the first place, the damage is claimed to have accrued to E. N. Case individually, by reason of the breach of a contract made by him with the defendant Sweeny, while this suit was instituted by the Case Manufacturing Company. The set-off filed by the defendant was for merchandise sold to the Case Company. As to this set-off, the defendant would be deemed to have brought a suit; and, even if the damages claimed as a counter set-off by E. N. Case had been so

claimed by the Case Company, they were unliquidated damages,—not appearing to have grown out of the same transaction,—and should not have been filed as a counter set-off to the defendant's set-off. That unliquidated damages cannot be made the subject of set-off, see *Navigation Co.* v. *Rice*, 9 W. Va. 636; *Guano Co.* v. *Appling*, 33 W. Va. 470 (10 S. E. 809); and *Hargreaves* v. *Kimberly*, 26 W. Va. 788. The claim asserted by the plaintiffs in this case, to wit, eighty-one dollars and forty cents, must be considered the amount in controversy, so far as the right of the plaintiffs to this writ of error is involved; and, that being insufficient to entitle them to the jurisdiction of this Court, this writ of error is dismissed.

Dismissed.

CHARLESTON.

SILMAN v. STUMP *et al.*

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Submitted January 12, 1900.—Decided March 31, 1900.

BILL OF REVIEW—*Appearance—Demurrer.*

A petition filed by a widow on behalf of herself and infant children, alleging that their property has been sold and sacrificed under decrees deceitfully obtained by a creditor of the deceased husband and father, should be treated as an original bill in the nature of a bill of review, and should be properly matured before being finally heard; and it is error to dispose of the same adversely on mere *ex parte* affidavits, without appearance thereto, except by a disinterested party who demurs, and thereby admits the truth of the allegations of such petition. (p. 643).

Appeal from Circuit Court, Kanawha County.

Suit by Peter Silman against J. L. Stump and others. Judgment decrees for plaintiff, and defendant, Mattie A. Savage, appeals.

Reversed.

W. S. LAIDLEY and T. S. CLARK, for appellant.

J. F. CORK, and WATTS & ASHBY, for appellee.

DENT, JUDGE:

Mrs. Mattie A. Savage appeals from four several decrees of the circuit court of Kanawha County in the case of Peter Silman, administrator, against J. L. Stump and others. This is a suit instituted by Peter Silman, administrator of James R. Savage, deceased, against the widow, heirs, and creditors of said decedent, to subject his real estate, consisting of a house and lot, to the payment of his debts. The suit appears to have been matured regularly. Guardian *ad litem* was appointed for the infant defendants. An answer was filed for the appellant admitting the debt of J. L. Stump, and asking that her dower be set aside to her in money. The other adult defendants answer, and a reference is had to a commissioner, who makes his report. No exceptions thereto, and the report is confirmed. A decree for sale is entered. The property is sold, sale reported, and confirmed without exception. The Glen Elk Company debt is sustained by the deed of trust, and is admitted by the appellant. The Stump debt is admitted to be correct by the appellant, and is sustained by Stump's evidence, the only two persons having knowledge of its justness. In absence of contest over them, the evidence in support of each is sufficient to establish at least a *prima facie* case. These are the only two debts presented. The appellant having agreed to take her dower in money, the court could not determinle the same until sale of the property. She was not entitled to dower as against the purchase money, nor the costs made necessary to enforce the same. Costs partake of the nature of the debt in behalf of which they accrue. She is entitled to dower against the Stump debt and the costs made necessary to enforce the same. The dower in the case arising from the sale of the land is not of sufficient money value to give this Court

jurisdiction. Nor could the Court review the errors in the taxation and allowance of costs for the same reason. There is no error prejudicial to the appellant in any of the decrees entered prior to the filing of her petition of which this Court has jurisdiction. The only questions of error, then, of which this Court has jurisdiction, arise on this petition, which must be regarded as an original bill in the nature of a bill of review. *Springston* v. *Morris*, 34 S. E. 766. While no parties are formally made to this bill, which is the better practice, yet the plaintiff and defendants in the original bill, and the purchaser of the property, all of whom are necessary parties thereto, are named therein; and, if they did not appear without, should have been summoned to answer the same. This bill, although not stating so succinctly, appears to have been filed by the appellant in behalf of herself and as next friend for her infant children for the purpose of securing their rights in the property in controversy. This she had the right to do. Among other things, she alleges that she authorized no one to appear and file an answer for her in said suit, but such answer was filed without her consent or authority; that "the Glen Elk Company informed her that they had brought no suit, and did not wish to enforce their claim, but would give her all the time desired; and Dr. Stump told her that he would not force the property to sale, but would get in condition that when she found a purchaser the court could sell and confirm the sale and make a title; that she has been offered six hundred dollars for the property, and files affidavits herewith showing it to be worth eight hundred dollars, etc; that she never appeared before the commissioner making the report, nor did she know of the property being advertised for sale, and when she heard of it she went to Dr. Stump, and reminded him of his promise not to sell the same, and he said he would attend to it, and notify her, and he never notified her of anything, and when she heard it had been sold she went to Mr. H. B. Smith, and he said he would notify her of the time to go before the court to have the sale set aside, and she received a letter from him dated October 28, 1896, saying the report had been offered to the court, 'and for me and my attorney to go at once to

file objections,' etc., 'when I immediately went the same day, and there was no court in session, and I learned afterwards that the sale had been confirmed more than a week from this date; so that by the promises of both parties your petitioner has been deprived of making objections to the progress of the cause and the disposition of her property.'" There was no appearance to this petition except by the plaintiff, who demurred thereto. No process was issued thereon. The circuit court, after making an order allowing a small sum for dower out of an alleged excess, and applying it to rent, refused the relief prayed in the petition, and thereby virtually sustained the demurrer thereto, although such demurrer admits the allegations aforesaid. The property had sold for three hundred and sixty dollars. The demurrer admits it to be worth eight hundred dollars, and that the petitioner was prevented from making defense in the suit by the conduct and promises of the real plaintiff, to wit, J. L. Stump, in whose interest the suit was brought and prosecuted; and thus preventing her from attending the sale, and bidding on the property, or preventing its confirmation. The petition further alleges that the property would rent for sufficient in five years to pay the indebtedness thereon, or that it could be so partitioned that a part thereof could either be laid off for her dower, or sold for sufficient to pay the indebtedness. These allegations are admitted to be true by the demurrer. No answers are filed, but four affidavits are improperly received and considered by the court to controvert the value of the property as admitted by the demurrer of one of the affiants. The offer made by the purchaser to the widow to take four hundred dollars cash for the property must be regarded as a mere bluff, as he well knew she had not the cash, and twenty-four dollars and thirty-four cents had already been taken off of her for alleged rent. However this may be, the court should have treated her petition as an original bill in the nature of a bill of review, and, if the proper parties thereto declined to appear and answer without, process should have been issued and served upon them. If she and her children have been unjustly deprived of their property by deceitful representations of the creditor for whose debt it was be-

ing sold, it should be restored to them, and, if not, the parties in interest could have easily made this plain by proper pleadings and proofs according to the practice, principles, and rules of equity. It is the peculiar province of a court of equity to protect those who are helpless, and unlearned in the law, from the greedy machinations and deceitful practices of others; and a widow ought not to be denied her just dues through fear that through her oft-repeated coming she may be troublesome. The decree of the 3d day of May, 1897, is reversed, and this cause is remanded to the circuit court, with direction to mature the petition of the appellant treated as an original bill in the nature of a bill of review for a hearing, and to further dispose of the same according to the rules and principles governing courts of equity; and that Peter Silman, the appellee, personally pay the costs of this appeal, his defense of this petition being a violation of his duty to protect and preserve the estate of his decedent.

Reversed.

CHARLESTON.

WOOD *et al v.* CITY OF HINTON.

Submitted January 24, 1900.—Decided March 31, 1900.

1. ACTION AGAINST CITY—*Allegations.*

A declaration filed against a municipal corporation in an action on the case, which avers that the common council authorized the plaintiff to erect a carpenter shop on a certain lot within such municipality, with the knowledge that a steam engine would be necessary in running the machinery connected with such shop, and that after the erection of such shop the council modified such permit so as to forbid the

use of such steam engine therein, to the great damage and loss of the plaintiff, states no sufficient cause of action against such municipality. (p. 648).

2. ABATEMENT OF NUISANCE—*Damages.*

The power of the common council of a city, town, or village to prevent or abate nuisances is governmental and discretionary, and for the proper exercise thereof the city cannot be held liable for the loss or destruction of property or damages occasioned thereby. Such loss, if any, must fall upon the actual or proposed nuisancer. (p. 648).

Error to Circuit Court, Summers County.

Action by D. C. Wood & Co. against the city of Hinton. Judgment for plaintiffs, and defendant brings error.

Reversed.

MILLER & READ, for plaintiff in error.

VINSON & THOMPSON, for defendants in error.

DENT, JUDGE:

D. C. Wood & Co., plaintiffs, sued the city of Hinton, defendant, in the circuit court of Summers County, and recovered a judgment for $——. Defendant obtained a writ of error. The whole questioned involved rises on the demurrer to the declaration which is as follows: "State of West Virginia, County of Summers—ss.: In the circuit court thereof. D. C. Wood and W. H. Griffith, partners in trade under the firm name and style of D. C. Wood & Co., complain of the city of Hinton, a municipal corporation duly organized and existing under the laws of the State of West Virginia, of a plea of trespass on the case, for that theretofore, to wit, on the —— day of ———, 1897, at the time of the damage and injury to the said plaintiffs as hereinafter mentioned, in the city of Hinton as aforesaid, the plaintiffs applied to the common council of the said city of Hinton, then and there assembled for the purpose of transacting business for the said city of Hinton, for permission to erect a carpenter shop on a certain lot in said city (said lot being on Third avenue, and known as the 'Saul Lot'); and the said common council, well knowing of what the said carpenter shop consisted, and how the same was to be operated, granted the plaintiffs the privilege to erect said

carpenter shop upon the said lot, within the corporate limits of said city. The plaintiffs, acting in good faith and in accordance to the provisions in said permit, leased the lot mentioned as aforesaid for a period of five years, paying therefor a large sum of money, to wit, three hundred dollars, and, still acting in accordance to said permit, the plaintiffs proceeded to tear down the building in which said carpenter shop was located, and to move said building and shop, and all tools and fixtures thereto belonging, a great distance, and at a great cost, to wit, three hundred dollars, and the plaintiffs began to erect their shop, complying with the terms of the said permit granted by the said common council; and after they had gotten the said building well-nigh completion, and had expended a great deal of labor and a large sum of money, to wit, five hundred dollars, in the purchase of material and the hire of labor for the construction of the said building on the lot aforesaid, to wit, the Saul lot, the said common council for the city of Hinton, without notice to the plaintiffs, convened a meeting, and at said meeting the said common council revoked or so changed the said permit as to prevent the said plaintiffs from putting in the machinery and appliances necessary to run said carpenter shop, and on the —— day of ———, 1897, the chief of police for the city aforesaid served a notice on the plaintiffs not to put in said shop any steam engine, thereby rendering the said shop entirely worthless to the plaintiffs; the said defendant well knowing at the time the permit aforesaid was granted that, in order to operate the machinery which was necessary to carry on their business aforesaid, it was necessary for them to employ a steam engine, in order to operate their machinery aforesaid. And by reason of the order revoking and changing said permit, and the notice served by the chief of police aforesaid, the machinery, tools, appliances, and steam engine were greatly damaged, impaired, and rendered worthless, by reason of the plaintiffs' inability to procure proper place to store the same, to the amount of two hundred dollars. And by reason of the premises aforesaid, to wit, the revocation of the order or permit for the erection of the building aforesaid, plaintiffs were hindered, delayed, and prevented from carrying on their usual

business and avocation for a long space of time, to wit, for the space of ——— months, by reason of which they sustained great injury and loss, to wit, to the amount of seven hundred dollars, by reason of the allegations aforesaid, and the premises aforesaid, all of which were well known to the defendant. Wherefore, by means of the premises, and of the wrong, grievances, and injuries hereinbefore mentioned, said plaintiffs have sustained damages to the amount of two thousand dollars. Therefore they sue. Lively, Thompson & Lively, and J. S. Thompson, P. Q."

This declaration states no cause of action against the city of Hinton, whatever. The city of Hinton, as a branch of the State government, cannot be held liable in a suit for damages for any act done by its officers in discharge of, or attempting to discharge, its governmental powers. Among these, as provided in the statute, is the power to prevent injury or annoyance to the public or individuals from anything dangerous, offensive, or unwholesome; to abate or cause to be abated anything which, in the opinion of the majority of the whole council, shall be a nuisance; to regulate the keeping of gunpowder and other combustibles. None of these are what are called positive or administrative powers, but they are all purely governmental and discretionary. The refusal of the town authorities to permit the use of a steam engine in the building complained of is probably because of its being a nuisance, either from fire, smoke, or noise. or all combined. Whether it was so or not, that was a matter for the council to determine; and, it having so determined, its action is final, unless annulled by proper judicial proceedings. This right of the council seems to be conceded, but the complaint is that the council first gave permission, and then, after it had been acted upon by the plaintiffs at large expense, it revoked the authority to use a steam engine, and thereby cause the plaintiffs loss and damages. If the council is wrong in the course it pursued, the town is in no sense liable. Even after the works were fully erected and in operation the town would have had the right to abate them, if they proved o be a nuisance to the public or individuals. This belongs to its governmental and public powers. Every person engaged in a business that may become a nuisance must take

notice of the law in this respect, although permitted to do so in the beginning by public authority. This is a risk assumed when such business is engaged in by such person. It is beyond the power of the town council to contract away the authority to prevent or abate nuisances, and, if they should do so, their acts are *ultra vires* null and void, and the town is not bound thereby, nor made liable to damages by reason of a breach of such void contract. *Parkersburg Gas Co.* v. *City of Parkersburg*, 30 W. Va. 435, (4 S. E. 650); *Spilman* v. *City of Parkersburg*, 35 W. Va. 605, (14 S. E. 279). It is not averred in the declaration that the act complained of was wrongful or illegal, and, if not, the town could not, certainly, be liable for the lawful acts of any of its authorities. If either the granting the permit in the first instance, or revoking it in the second, was an unlawful assumption of authority, which is not averred in the declaration, the town could not be held liable for damages consequent thereon or arising therefrom. It has been repeatedly held that, "as to the powers and functions of an incorporated town of a public governmental character, it is not liable for damages caused by the wrongful acts of negligence of its officers or agents therein." *Bartlett* v. *Town of Clarksburg*, 45 W. Va. 393, (31 S. E. 918), 43 L. R. A. 295; *Thomas* v. *Town of Grafton*, 34 W. Va. 282, (12 S. E. 478); *Brown's Adm'r* v. *Town of Guyandotte*, 34 W. Va. 299, (12 S. E. 707), 11 L. R. A. 121; *Mendel* v. *City of Wheeling*, 28 W. Va. 233. If the act complained of was a lawful exercise of power, which appears to be admitted in the declaration, the town could not be held liable, although injurious to the individual. Such injuries always are the result of the prevention or abatement of nuisances, and yet they must be prevented or abated by the police power; and the nuisancer must bear the loss occasioned thereby, even to the expense of abatement. *Baumgartner* v. *Hasty*, 100 Ind. 575; *Meeker* v. *Van Rensselaer*, 15 Wend. 397. From this it is plain the plaintiff showed no cause of action against the defendant. The judgment is reversed, the demurrer to the declaration sustained, and the suit dismissed.

Reversed.

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CHARLESTON.

McGRAW v ROLLER.

Submitted February 10, 1900—Decided March 31, 1900.

APPEAL—*Error—Record—Affirmance.*

Where the record shows no error affirmatively, the judgment will be affirmed. *Craft* v. *Mann* (W. Va.) 33 S. E. 260; *Furbee* v. *Shay* (W. Va.) 34 S. E. 746; *Griffith* v. *Corrothers*, 24 S. E. 569; (42 W. Va. 59); *Webb* v. *Bailey*, 23 S. E. 644, (41 W. Va. 463). (p. 652).

Error to Circuit Court, Webster County.

Action by John T. McGraw against John E. Roller. Judgment for plaintiff. Defendant brings error.

Affirmed.

W. S. LAIDLEY, for plaintiff in error.

JAKE FISHER and W. E. R. BYRNE, for defendant in error.

DENT, JUDGE:

John T. McGraw, plaintiff, sued John E. Roller, defendant, in an action of *assumpsit*, in the circuit court of Webster County, and obtained a judgment for eight hundred and thirty-seven dollars and forty-two cents. The defendant now here insists that the court erred in refusing to quash the summons and abate the action. The ground of his motion is that at the time of the service of the summons he claims that he was a non resident of the State, temporarily in attendance on the court, both as a suitor and an attorney, and was, therefore, privileged from the service of civil process. After service of summons, the rules were duly taken, and on the 12th day of November, 1898, the court entered the following order and judgment:

"*John T. McGraw* vs. *John E. Roller*. In *Assumpsit*. This day came the plaintiff, by Jake Fisher, his attorney, and the defendant, by H. C. Thurmond, his attorney, ap-

peared specially for the purpose of having the writ quashed, and thereupon the said defendant, by his said attorney, moved the court to quash the writ herein for reasons stated in his special plea, and the said defendant tendered his said special plea in writing, setting out the matters aforesaid, to the filing of which the plaintiff objected, which objection, being considered by the court, is sustained, and said special plea is refused, and the motion aforesaid overruled, to which ruling of the court the defendant, by his attorney, excepted. Whereupon the said defendant was solemnly called, but came not, and all matters of law and fact arising in this case are submitted to the court, and thereupon the court finds for the plaintiff the sum of eight hundred and thirty-seven dollars and forty-two cents. Therefore, it is considered by the court that the plaintiff, John T. McGraw, recover of the defendant, John E. Roller, the sum of eight hundred and thirty-seven dollars and forty-two cents, with interest thereon from this date, together with his costs in this behalf expended."

The plea referred to is as follows, to wit:

"The said defendant, by his attorney (appearing only for the purpose to have the writ in this case quashed), for plea says: That the defendant, John E. Roller, is a non-resident of the State of West Virginia; that he is a practicing attorney in the circuit court of Webster County; that the last (August) term of said court began on the 1st day of August, 1898; that said defendant was within the jurisdiction of the court as a practicing attorney, and also as a suitor therein, attending to his business as such attorney and suitor in said court on the 1st day of August, 1898; that the writ in this case was served on defendant on said 1st day of August, 1898, as appears by the return of the sheriff thereon; that defendant believes that he was exempt from the service of said writ on him on said day, as well as during said term of court, and also during his attendance at and upon said court, and in going to and returning from the same; that defendant is now, and was on the 1st day of August, 1898, a resident of the State of Virginia. Wherefore, the defendant prays the judgment of this Court if it will take cognizance of the return on said writ, and

that the return thereon be quashed. H. C. Thurmond, Attorney.

"State of West Virginia, Webster County, to wit: H. C. Thurmond, being sworn, says that he is the attorney for the defendant named in the foregoing plea (for the purposes therein stated); that he knows the contents thereof, and that the facts and allegations therein contained are true, except so far as they are stated to be upon information and belief; and that such facts as are therein stated to be upon information and belief he believes to be true. Sworn to before me this 10th day of November, 1898."

This is the whole of the record made in court. There is no bill of exceptions nor certificate of facts. The plea was properly rejected. It was not verified by affidavit (section 39, chapter 125, Code) nor filed in time, as required by section 16, *Id.* The motion to quash comes too late, because it amounts to an exception to the jurisdiction of the court through failure of proper service of the summons, and therefore could only be raised as required in the last section, referred to by plea in abatement. There is still another serious objection to the consideration of this case on the legal question raised by the plaintiff in error, and this is that the record presents no facts on which this Court can act. In his unsworn plea defendant attempts to set out facts showing the privilege he claims for himself; that is, immunity from summons. This does not amount to proof, but is merely a rejected pleading. On his motion the court found against him. By its records it may have possessed the information as to whether he was an attorney or suitor required to be in attendance on the day of the service of the summons or not. This Court has no such source of information; and the circuit court, having found against him, must have determined that he was not such a person as was entitled to immunity from the service of process. Its judgment is presumed to be right, and he must show the error therein by the record. It must affirmatively appear. The evidence on which the circuit court determined the motion does not appear in the record. There is nothing that this Court can do but affirm the judgment, which is accordingly done.

Affirmed.

CHARLESTON.

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PHILLIPS *et al.* v. DEVENY.

Submitted January 30, 1900—Decided March 31, 1900.

JUSTICE—*Summons—Amendment.*

Where a party brings a civil action for the recovery of money, on contract, before a justice of the peace, and has the summons served and returned, he cannot, over the objection of the defendant, on motion, have the summons amended by inserting the names of additional parties as joint plaintiffs. (p. 655).

Error to Circuit Court, Marion County.

Action by J. F. Phillips and others against Thomas A. Deveny. Judgment for plaintiffs, and defendant brings error.

Reversed.

WILLIAM S. HAYMOND and B. L. BUTCHER, for plaintiff in error.

W. S. MEREDITH and P. M. HOGE, for defendants in error.

ENGLISH, JUDGE:

On the 16th of March, 1897, J. F. Phillips brought a civil action against Thomas A. Deveny, for one hundred dollars, before a justice of the peace of Marion County. On March 23d the summons was returned, "Executed," and the case was, on motion of the defendant, continued for seven days; and on March 30th counsel for plaintiff moved to amend the summons by inserting the names of J. O. McNeely, J. M. Arnett, C. O. Jackson, C. B. Nay, James H. Nuzum, and J. P. Thompson, a bridge committee, as joint plaintiffs with said Phillips. To this amendment the defendant objected. The objection was overruled, and said names were inserted. After the plaintiffs had introduced all of their evidence in support of the claim sued on in this ac-

tion, the defendant, by his counsel, moved the court to exclude said evidence because the contract sought to be recovered upon was a verbal one, and was within the statute of frauds, and should be in writing, to make the defendant liable for its performance, which motion was overruled. The defendant was then examined as a witness, and judgment was rendered for the plaintiffs for one hundred dollars, with interest and costs. From this judgment an appeal was taken by said Deveny to the circuit court of said county, which appeal was certified by said circuit court to the intermediate court for trial, and that court gave judgment for the defendant. The plaintiffs took a bill of exceptions, setting forth the evidence, and obtained a writ of error to the circuit court, and that court, having considered the case, reversed the intermediate court, and gave judgment for the plaintiffs. From this judgment the defendant obtained this writ of error, which brings up for our consideration the regularity of the proceedings before the justice of the peace.

It appears that this suit was instituted by Phillips alone, against the defendant, and, after the summons had been executed, counsel for the plaintiff moved to amend the summons by inserting the names of six other parties (a bridge committee) as joint plaintiffs with Philips, which amendment was allowed by the justice over the objection of the defendant, and the case proceeded in the name of all of these plaintiffs until its final determination. Was it proper to allow this introduction of new parties plaintiff by amendment of the summons? The summons prescribed by statute was directed to a constable, commanding him, in the name of the State of West Virginia, to summon Thomas A. Deveny to appear before the justice, on a day therein named, to answer the complaint of J. F. Phillips in a civil action for the recovery of money due on contract; and while in response to that summons the defendant was required to appear, and might have come prepared to answer the complaint of Phillips, *non constat* that he should come prepared to answer the complaint of six other parties plaintiff, known as a "bridge committee," or as many more names as the plaintiff might ask to have inserted as joint plaintiffs in the summons. Our statutes

are liberal in reference to amendment of pleadings on trials before justices of the peace, and in an action of unlawful detainer the justice may allow an amendment of the summons, if, in his opinion, the description of the premises is not sufficient; but we fail to find any statute allowing the summons to be amended by making additional parties plaintiff after the summons has been issued and served. Section 15, chapter 125, of the Code, provides that the court may permit the plaintiff to amend the writ or declaration so as to correct a variance, but it does not allow the writ to be so amended as to make new parties plaintiff. In the case under consideration, Phillips filed his complaint, and demanded one hundred dollars; and, although six other plaintiffs were added by amendment, the case was tried and judgment given on the complaint and demand of Phillips alone. We cannot perceive how a demand asserted by Phillips as due to himself alone can constitute the same demand or cause of action due to him and six others. Such a change of plaintiffs surely introduced a new cause of action, and it was error in the justice to render judgment for the plaintiffs in said action. It was also error in the circuit court, on appeal, to render judgment for said demand and interest. In my view of the case, the evidence shows that said Phillips had no cause of action against the defendant, and the names of the other plaintiffs were improperly inserted in the summons. The judgment is reversed, and the action dismissed, without prejudice to any proper action the plaintiffs may see cause to institute.

Reversed.

CHARLESTON.

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LEWIS v. CHESAPEAKE & OHIO RY. CO.

Submitted January 13, 1900—Decided March 31, 1900.

1. CARRIERS—*Loss of Freight—Damages—Liability.*

The Chesapeake and Ohio Railway Company received for shipment to Liverpool two car loads of lumber, and issued its bill of lading, containing, among others, this clause: "(12) This contract is executed and accomplished, and all liability hereunder terminates, on the delivery of the said property to the steamship, her master, agent, or servants, or to the steamship company, or on the steamship pier at the said port [Newport News]; and the inland freight charges shall be a first lien, due and payable by the steamship company." *Held*, that the placing of the lumber on the pier of the Chesapeake and Ohio Railway Company at said port, under its own exclusive control and custody, was not sufficient to relieve it of its liability as a common carrier for damages for the loss of said lumber. (p. 659).

2. DEMURRER TO EVIDENCE—*Judgment.*

On a demurrer to evidence, if the evidence is such that the court ought not to set aside the verdict of a jury in favor of the demurree, the court should give judgment against the demurrant. (p. 664).

Error to Circuit Court, Kanawha County.

Action by C. C. Lewis against the Chesapeake & Ohio Railway Company. Judgment for plaintiff, and defendant brings error.

Affirmed.

SIMMS & ENSLOW, for plaintiff in error.

FLOURNOY, PRICE & SMITH, for defendant in error.

" " McWHORTER, PRESIDENT:

On the 1st day of March, 1897, and on the 11th day of the same month, C. C. Lewis shipped over the Kanawha and

Michigan Railway two car loads of lumber, consigned to E. D. Hotchkiss, Newport News, Virginia, to be shipped to Liverpool, England. Lewis sent the bills of lading issued by the Kanawha and Michigan Railway to Thurston Lewis, at Cincinnati,—the agent of the Chesapeake and Ohio Railway Company, who issued foreign bills of lading over the Chesapeake and Ohio Railway and the Chesapeake and Ohio Steamship Company, Limited. One car load arrived at Newport News on the 12th day of March, and the other on the 31st day of March, 1897. That arriving on the 12th of March was unloaded on the 19th of March, and the other was unloaded on the 10th of April, and the lumber piled on the pier of the Chesapeake and Ohio Railway Company at the place, to be delivered to the Chesapeake and Ohio Steamship Company. In the early morning of the 27th of April the pier took fire from the adjoining pier, and the lumber was destroyed. Lewis brought his action of trespass on the case against the Chesapeake and Ohio Railway Company in the circuit court of Kanawha County for damages for the loss of the lumber. Defendant demurred to the declaration, and each count thereof, in which plaintiff joined, and, on being argued, the court overruled the demurrer, to which ruling defendant excepted; but as defendant neither in its petition for writ of error nor in its brief adverts to the same, and as the declaration seems to be sufficient, it will be so regarded. On the 29th of March, 1899, a jury was impaneled and sworn to try the general issue of not guilty. When the evidence was all in, the defendant demurred in writing to plaintiff's evidence, in which the plaintiff joined, and the jury returned a verdict, subject to the decision of the court on the demurrer, assessing the damages of plaintiff at the agreed sum of two hundred and seventy dollars and thirty cents in case the court should overrule the demurrer. On the 29th of March the court overruled the demurrer to the evidence, and entered judgment upon the verdict. Defendant obtained from one of the judges of this Court a writ of error and contends that the court erred in not sustaining the demurrer to the evidence, for the reason that the stipulation in the bill of lading exonerated the company from liability from fire not caused by the carrier's negligence; and, sec-

ond, "that the lumber was delivered at Newport News, and the bill of lading exonerates the company for any loss not occurring through its negligence after its delivery at the port for trans-shipment by the steamship company;" and, third, "that the stipulation provides that the company shall only be liable as warehouseman after it is placed in its warehouses or piers, and there was no negligence shown on the part of the company, and in fact it did not leave it to presumption, but the company showed by its testimony that it was not negligent." The clause in the bill of lading relied on by appellant to exonerate it for any loss in this case is as follows: "(12) This contract is executed and accomplished and all liability hereunder terminates, on the delivering of the said property to the steamship, her master, agent, or servants, or to the steamship company, or on the steamship pier at the said port; and the inland freight charges shall be a first lien, due and payable by the steamship company,"—and cites *Railway Co.* v. *Clayton*, 173 U. S. 348, 19 Sup. Ct. 421, 43 L. Ed. 725, in support of its position, the syllabus of which case is as follows: "The Texas and Pacific Railway Company received at Bonham, in Texas, four hundred and sixty-seven bales of cotten for transportation to Liverpool. It was to be taken by the company over its road to New Orleans, and thence to Liverpool, by a steamship company, to which it was to be delivered by the railway company at its wharf in New Orleans. Each bill of lading contained the following, among other, clauses: 'The terms and conditions hereof are understood and accepted by the owner, viz: (1) That the liability of the Texas and Pacific Railway Company in respect to said cotton, and under this contract, is limited to its own line of railway, and will cease, and its part of this contract be fully performed, upon delivery of said cotton to its next connecting carrier; and in case of any loss, detriment, or damage done to or sustained by said cotton before its arrival and delivery at its final destination, whereby any legal liability is incurred by any carrier, that carrier alone shall be held liable therefor in whose actual custody the cotton shall be at the time of such damage, detriment, or loss.' The cotton reached New Orleans in safety, and was unloaded at the wharf, and the

steamship company was notified; but, before it was taken possession of by that company, it was destroyed by fire at the wharf. The owners in Liverpool having brought suit against the railway company to recover the value of the cotton, that company, on the facts detailed at length in the opinion of the court, contended that the cotton had passed out of its possession into that of the steamship company, or, if the court should hold otherwise, that its liability as common carrier had ceased, and that it was only liable as a warehouseman. *Held*, that the goods were still in the possession of the railway company at the time of their destruction, and that that company was liable to their owners for the full value, as a common carrier, and not as a warehouseman." It is true, in that case the decision seems to turn on the provision in the bill of lading that "that carrier alone shall be held liable therefor, in whose actual custody the cotton shall be at the time of such damage, detriment, or loss;" and the defendant had placed the cotton on its own wharf at the place of delivery to the steamship company, and had notified the latter company that the cotton was upon the wharf, ready for the steamship company to take it away, and made request that it be removed; but the company had not received it, and it was held to be in the actual custody of the defendant. And it is stated in the opinion in the case that: "It may be taken as established by the evidence that the cotton in question was for some days before the fire in a position on the wharf ready to be taken by the steamship company. So far as the management of the wharf and the protection of the cotton against fire were concerned, the evidence failed to show any negligence on the part of the railway company. The defendant moved for a verdict in its behalf upon two grounds: (1) The evidence showed a delivery to the connecting carrier before the fire occurred; (2) if no delivery took place before the fire, there had been a sufficient tender of the cotton to the steamship carrier, and thereafter, in view of the facts, the railway company should be deemed to have held it as a warehouseman, and, as there was no proof of negligence, it was not liable for the value of the cotton." And it was held that defendant could not convert itself into a warehouseman by proving that it had, before

the fire, tendered the goods to the connecting carrier, and that the latter neglected, although without reasonable excuse, to take them into its actual custody. "There is no room for the contention that the defendant had ceased to be a carrier, and become a warehouseman. It had done no act evidencing its intention to renounce the one capacity and assume the other. Although it had requested the steamship line to remove the cotton, it had not specified any particular time within which compliance was insisted on, and had not given notice that the cotton would be kept or stored at the risk of the steamship line upon failure to comply with the request. The request to come and remove it 'as soon as practicable' was, in effect, one to remove it at the earliest convenience of the steamship line. There is nothing in the case to indicate that the defendant had not acquiesced in the delay which intervened between the request and the fire."

It is contended by appellant in its brief that stipulation No. 12 in the through bill of lading "expressly provides that the contract of the Chesapeake and Ohio Railway Company is executed and accomplished when the lumber should be placed on the pier of the steamship company at Newport News, which was done." The pier upon which the lumber was placed was not the pier of the steamship company, but the pier of the defendant, entirely and wholly under its control and in its custody, and over which the steamship company had no control. The shipper, by this contract, was to understand that the steamship company had a pier at Newport News, under its control and custody, and that, when his lumber should be placed on such pier, it would be in the care of a reliable and responsible company. But it was not placed on the pier of the steamship company, but on the pier of defendant, and remained in its care and custody; and, as held in *Michigan Cent. R. Co.* v. *Mineral Springs Mfg. Co.*, 16 Wall. 318, 21 L. Ed. 297: "Public policy will not allow the carrier to escape responsibility on storing the goods at the end of his route, without delivering, or an attempt to deliver, to the connecting carrier. If there be a necessity for storage, it will be considered a mere accessory to the transportation, and as not changing the nature of the bailment." In *Mc-*

Donald v. *Railroad Co.*, 34 N. Y. 497, it is held: "When goods are shipped and must pass through the hands of several intermediate carriers before arriving at the place of their destination, the duty of each intermediate carrier is to transport the goods safely to the end of his route, and deliver them to the next carrier beyond. An intermediate carrier in such case does not relieve himself from liability by simply unloading the goods at the end of his route, and storing them in his warehouse, without delivery or notice to, or any attempt to deliver to, the next carrier." *Goold* v. *Chapin*, 20 N. Y. 259. Appellant did nothing to change its relation from that of carrier to warehouseman, although it is claimed that delivery was made by placing the goods on its own pier, and yet retaining control and custody of it. The contract fairly bears the construction that the delivery was to be on the pier of the steamship company. If it were not intended to be so understood, clause twelve should have provided distinctly for delivery on its own pier, from which the steamship was loaded; and, even with such provision, it is very doubtful whether it could escape its liability as carrier. Such a provision, if held good, would place the shipper under the necessity of having an agent at the port to look after the reshipment of his goods, to pass them on to their destination. In this case the shipper lives and does business some four hundred or five hundred miles from the terminus of appellant's route, and it would be unreasonable to require him to look after the transfer of his goods. There was certainly no delivery of the goods on the pier of the steamship company at the port of Newport News. In *Berry* v. *Railroad Co.*, 44 W. Va. 538, (30 S. E. 143), it is held that "a contract or clause in a bill of lading limiting the liability of a common carrier or exempting it is valid, provided it is based on a valuable consideration, and does not so limit or exempt from liability or negligence of the carrier." *Maslin* v. *Railroad Co.*, 14 W. Va. 180; *Brown* v. *Express Co.*, 15 W. Va. 812; *Zouch* v. *Railway Co.*, 36 W. Va. 524, (15 S. E. 185), 17 L. R. A. 116; 5 Am. & Eng. Enc. Law, 298. There is nothing in the case at bar to show that there was any valuable consideration for any of the limitations or exemptions in favor of appellant, in the way of reduced freight or

otherwise. Appellant cites and relies on *Railroad Co.* v. *Reeves*, 10 Wall. 176, 19 L. Ed. 909; *Morrison* v. *Davis*, 20 Pa. St. 171; and *Denny* v. *Railroad Co.*, 13 Gray 481. In all these cases the proximate cause of the loss of the goods was the result of the immediate act of God. In the first, an unexpected and unusual flood in the Tennessee river at Chattanooga, where the tobacco in question was caught by the waters in the defendant's cars. In the case of *Morrison* v. *Davis*, when the goods were being transported on a canal they were injured by the wrecking of the boat, caused by an extraordinary flood. And in *Denny* v. *Railroad Co.*, while the goods were properly in the depot of the defendant at Albany, they were submerged by a sudden and violent flood in the Hudson river.

While appellant does not contend for it in its brief, in its petition for writ of error it seems to rely upon the eleventh clause of the bill of lading to give it the character of warehouseman after the lumber was placed on its pier at Newport News, which provision is that "no carrier shall be liable for delay, nor in any other respects than as warehouseman, while the said property awaits further conveyance; and in case the whole or any part of the property specified herein be prevented, by any cause, from going from said port in the first steamer of the ocean line, as above stated, leaving after the arrival of such property at said port, the carrier hereunder then in possession is at liberty to forward said property by succeeding steamers of said line, or, if deemed necessary, by any other steamer." It appears, however, that two steamers of the line which was to carry the lumber left the port after the last car of the lumber should have arrived at the port. It was received by appellant on the 12th of March, and should have been at the port some days before the sailing of the Kanawha, on the 24th of March, and was there some days before the departure of the Rappahannock, on the 3d of April. Whether the lumber was forwarded "with reasonable dispatch" to Newport News (the last car being received on the 12th, and reaching port on the 30th, of March) was a fact for the jury to decide.

It is contended by appellee that the carrier, being bound at common law to forward the property intrusted to it,

with reasonable dispatch, on failure to do so is liable for its loss. *McGraw* v. *Railroad Co.*, 18 W. Va. 361. The second clause in the bill of lading recognizes this obligation, when it provides that "no carrier is bound to carry said property by any particular train or vessel, or in time for any particular market, or otherwise than with as reasonable dispatch as its general business will permit;" and it is claimed to be shown by the evidence that defendant was guilty of most culpable and inexcusable negligence and delay in forwarding this lumber. By defendant's witness, C. E. Doyle, it is shown that three or four days are considered a very good time on coal from the coal territory up here to Newport News, and the class of freight in question would be about the same. One of the cars was shipped on the 1st day of March, and the other the 10th day of same month. The property was destroyed by fire on the 27th day of April; one car load having been in the custody of the defendant fifty-seven days, and the other forty-seven days, before it was burned. The first car reached Newport News March 12th. The second car, instead of reaching the port by the 16th of March, was not received there until the 30th of March. It appears from the evidence that the steamship company had at that time three steamers plying between Newport News and Liverpool,—the Kanawha, Rappahannock, and Shenandoah. The first left Newport News for Liverpool on March 24th, and it is contended by appellee that, if the appellant had forwarded the lumber with reasonable dispatch, both cars would have been at Newport News in ample time to be loaded upon that vessel, as one car had already been there twelve days before the sailing of the Kanawha, and the other had been twelve days in the custody of appellant, while reasonable dispatch only requires three or four days for it to reach the port. The Rappahannock sailed from Newport News April 3d, and yet it was not shipped on that vessel. Appellant introduced evidence tending to show that the cargo of the Rappahannock had been made up some three weeks or more before she sailed; but the witness, H. C. Blackiston, who said that the cargo of the Rappahannock was made up by freight that had been brought prior to March 18th, or the 12th of March, and

that they got the information of the shipment of the two car loads on the 20th of March, and that the lumber was allotted to the Shenandoah, which should have been at Newport News on the 18th of April, but which did not arrive until the 27th of April, on cross-examination said they practically cleaned up all the Liverpool freight that was available for shipment at that time, that there was very little left when she sailed, if anything. Whether there was negligence on the part of appellant was a question for the jury, under all the evidence in the case. "If the evidence is such that the court ought not to set aside the verdict of a jury in favor of the demurree, then upon a demurrer to that evidence the court should give judgment against the demurrant." *Heard* v. *Railway Co.*, 26 W. Va. 455; *Fowler* v. *Railroad Co.*, 18 W. Va. 579. The judgment of the circuit court is affirmed.

Affirmed.

CHARLESTON.

MILLER *v.* MORRISON *et al.*

Submitted January 24, 1900—Decided March 31, 1900.

1. VENDOR'S LIEN—*Parties.*

In a suit to enforce a lien for purchase money of land by a holder of one note given therefor, holders of other notes equally secured by such lien are necessary parties. (p. 666).

2. NECESSARY PARTIES—*Decree—Reversal.*

Where necessary parties are not before the court, the decree will be reversed without passing on the merits of the case affecting them, and the case remanded for further proceedings. (p. 667).

3. SPECIFIC PERFORMANCE—*Parties—Adverse Claims.*

In a suit for specific performance of a contract for sale of land, persons claiming hostile and distinct titles adversely to the title sold by the vendor to the vendee are neither necessary nor proper parties, as equity will not settle conflicting titles to land where the plaintiff has no equity against the person claiming adversely. *Heavner* v. *Morgan*, 4 S. E. 400, (30 W. Va. 335), (Syl., point 2), disapproved. (p. 669).

Appeal from Circuit Court, Summers County.

Bill by Rose E. Miller against M. H. Morrison and others. From the decree, Rose E. Miller and certain of the defendants appeal.

Reversed.

MILLER & READ, for appellants.

E. C. EAGLE and MCWHORTER & LOWENSTEIN, for appellees.

BRANNON, JUDGE:

Rose E. Miller filed a bill in equity in the circuit court of Summers County against M. H. Morrison and others, stating that Nancy Hinton had sold and conveyed to Morrison a tract of land for one thousand eight hundred dollars, of which seven hundred dollars was paid cash and three hundred dollars was to be paid September 1, 1893, and eight hundred dollars to be paid April 5, 1894, for which deferred payments a lien was reserved; that Morrison executed two notes to Hinton for the deferred payments; that Hinton transferred to John Hinton two hundred and twenty-five dollars of the unpaid purchase money, and that Morrison, by agreement of parties, executed his note for that two hundred and twenty-five dollars, payable to John Hinton, and that John Hinton had assigned said note to James H. Miller, and that he had transferred it to Rose E. Miller; that said note was a lien as part of the purchase money under said deed, and the bill prayed a sale thereof. The bill does not say who owned the balance of the purchase money, except from the inference that it yet belonged to Nancy Hinton. Morrison filed an answer, stating that he paid off the three hundred dollars installment, and that by request of Nancy Hinton he had taken up the eight hundred dollar note, which was a negotiable

note, and in lieu of it had executed five new notes for the balance due on said note, which new notes were payable, one to Silas Hinton, one to John Hinton (which is the note sued on in this case), one to E. E. Helms, one to Mary A. Helms, one to John D. Hinton, and another to John D. Hinton. This answer denied all further liability on Morrison for payment of what balance he admitted as unpaid, on the ground that a part of the land was covered by an adverse title held by Warren Fox and Delilah Fox, and that, in addition to that interlock, there was a large deficiency in the quantity of the tract sold, and that he was entitled to abatement of the purchase money on account of the loss of land by reason of the Fox title and such deficiency in quantity, and that, if allowed for the same, he would owe nothing, but had overpaid the correct amount of purchase money; and the answer prayed that Morrison might be given a decree against Nancy Hinton for the amount which Morrison claimed to have overpaid. The case was referred to a commissioner to report on the quantity of the tract, and what abatement of purchase money Morrison was entitled to, what balance remained unpaid, the liens on the land, and their order. The court rendered a decree overruling substantially the findings of the commissioner, except as to the deficiency in quantity found by the commissioner, exonerating Morrison from the entire balance of purchase money, and decreeing three hundred and fifty-four dollars and sixty-two cents in favor of Morrison against Nancy Hinton for purchase money overpaid by Morrison. From this decree Rose E. Miller, John D. Hinton, Nancy Hinton, John Hinton, Mary A. Helms and E. E. Helms, unite in an appeal.

There is a plain want of necessary parties to the cause. The bill did not make Silas Hinton, John D. Hinton, Mary A. Helms, or E. E. Helms, parties, the owners of notes executed for purchase money, and vitally interested in the case. When the answer came in, showing their interest, as such owners, in the case, the plaintiff should have made them parties at once by amended bill; they claiming to be entitled to participate in the lien for purchase money for the notes executed by Morrison to them. This is not a judgment creditors' bill to convene judgment liens under

the statute requiring all judgment lienors to come forth and file their liens on pain of their loss, but it is a vendors' lien suit, and all persons holding notes secured by such lien are indispensable parties. *Benson* v. *Snyder*, 42 W. Va. 223, (24 S. E. 880); *Marshall's Ex'r* v. *Hall*, 42 W. Va. 641, (26 S. E. 300). Moreover, when the commissioner's report came in it disclosed that C. A. Alvis was assignee of John D. Hinton of one of the notes. He was not made a party. The decree took away from all these owners of notes representing, as claimed, the balance of the purchase money due from Morrison, all their rights without their being present, if such a decree, in their absence, could take away their rights. I think it could not, and that they could harass the purchaser, Morrison, with another suit. *Crickard* v. *Crouch's Adm'rs*, 41 W. Va. 503, (23 S. E. 727), only expresses an almost infallible rule of equity practice in holding that, "where proper parties are not properly before the court, the decree will be reversed, and the cause remanded for further proceedings." In *Smith* v. *Parsons*, 33 W. Va. 644, (11 S. E. 68), it is held that, when lienholders are interested in the lands of a debtor, "if it appears necessary to a safe and proper decision between the debtor and any lienholder that such lienholder should be a formal party, the court may and should require him to be made a party, though his debt has been reported as a lien by a commissioner's report made under an order to convene lienholders and report their liens." How much more so in a suit to enforce a vendor's lien, which is not a suit to convene judgment liens, but a suit for specific performance, and that lien is claimed to exist for the benefit of numerous parties, who are thus directly interested in the result of the suit, and necessary parties. It was the duty of the plaintiff to make these persons parties before asking a decree. It is said that they appeared before the commissioner, and filed their claims, and thus became *quasi* parties; but we do not know that they did. Their liens are reported by the commissioner, but whether they knew of the suit, and actually appeared, does not appear. As a fact it is denied by counsel as to some of them. I do not think that would make them parties in such a suit as this. This Court has so held in some case that I do not now re-

call. Such a mode of binding parties who are not parties to the pleadings, who are vitally interested in the result of the suit, and where the bill constituting the basis of adjudication contains nothing about them or their rights, will not stand in a court of equity. The bill contains not a hint of the rights of the holders of those notes except John Hinton. "There can be no decree without allegations in the pleadings to support it." *Shoe Co.* v. *Haught*, 41 W. Va. 275, (23 S. E. 553). I have said that the bill wants these parties. How as to the answer? It set up the rights of those absent parties except Alvis. Should it have made the owners of those notes parties? It prayed that the plaintiff be required to make them parties, which was proper; for that answer, as to the owners of those notes, was not an answer calling for affirmative relief, but as to all its matter claiming abatement for loss of land and deficiency in quantity was only matter of defense, not new matter calling for affirmative relief, and requiring Morrison to make them parties. *Paxton* v. *Paxton*, 38 W. Va. 616, (18 S. E. 765;) *Depue* v. *Sergent*, 21 W. Va. 326. As to these holders of said notes the only question I have is whether the decree, as to them, is not null and void, so as to deny them the right of appeal, they not being parties; but I understand that a party over whose right a void decree casts a cloud may have recourse to an appeal. They are sufficiently colorably parties so as to grant them an appeal to remove this trouble over their right, if they have any. Besides, Rose E. Miller and Nancy Hinton are entitled to appeal, and that brings the rights of all the parties before the court.

Next as to Nancy Hinton. Morrison's answer is the only pleading contesting her right to purchase money, or asking decree against her for overpayment. As to her, that answer is to be treated as containing new matter calling for affirmative relief, and she was entitled to be served with process to answer the same, and to be made a formal party thereto, as it prayed relief against her. She was just as much entitled to process as is a defendant to an original or cross bill. *Martin* v. *Kester*, 46 W. Va. 438, (33 S. E. 238); *Grobe* v. *Roup*, 46 W. Va. 488,(33 S. E. 261); *Goff* v. *Price*, 42 W. Va. 384, (26 S. E. 287). I consider, under these authorities, the decree against Nancy Hinton void. It is al-

leged by counsel and denied by counsel that she appeared before the commissioner. I see no formal appearance, even, there; but that would not bind her to an adjudication based not on the bill, but on matter found only in that answer of Morrison. Her signature to a paper agreeing the facts that Morrison at the time of his purchase resided in Pocahontas County cannot have the effect of making her a party to this cause for the purposes of that fact so admitted and all others involved in the case.

Are Fox and Roles necessary parties? They claim parts of the land sold by Nancy Hinton to Morrison by title distinct from and hostile to the title sold by Hinton to Morrison. Under *Heavner* v. *Morgan*, 30 W. Va. 335, (4 S. E. 406), they were necessary parties, and the plaintiff should have brought them in by amended bill. But the second point in that case has been regarded by the legal profession, so far as I have heard, as unsound in law, and is surely against standard authority. A suit to enforce purchase money is one of specific performance, one to enforce a contract between parties or their privies. A stranger claiming adversely to the rights of all the parties to that contract by distinct and hostile right has no privity or connection with it, or with rights under it, and has no right to a voice in its enforcement. Rights under that contract are confined to the parties to it and their privies. Barton's Ch. Prac. (volume 1, p. 227) says: "The general rule in all suits for specific performance is that none but parties to the contract are necessary parties to the suit. Therefore strangers claiming under an adverse title need not be brought in, although one claiming by an antecedent agreement is a proper party." Barton cites Daniell, Ch. Prac., which cites, among the cases to sustain this obvious principle, the case of *Tasker* v. *Small*, 3 Mylne & C. 63, in which Lord Chancellor Cottenham laid down the fundamental rule as follows: "It is not disputed that generally to a bill for specific performance of a contract of sale the parties of the contract only are the proper parties, and, when the ground of the jurisdiction of courts of equity in suits of that kind is considered, it could not properly be otherwise. The court assumes jurisdiction in such cases because a court of law, giving damages only for the

nonperformance of the contract, in many cases does not afford an adequate remedy. But in equity as well as at law the contract constitutes the right and regulates th liability of the party, and the object of both proceedings is to place the party complaining as nearly as possible in the same situation as the defendant had agreed that he should be placed in. It is obvious that persons, strangers to the contract, and therefore neither entitled to the right nor subject to the liabilities which arise out of it, are as much strangers to a proceeding to enforce the execution of it as they are to a proceeding to recover damages for a breach of it. And so is the admitted practice of the Court." So holds *Robertson* v. *Railroad Co.*, 10 Sim. 314. But let us look at our own authorities. *Lange* v. *Jones*. 5 Leigh 192, holds: "A court of equity has no jurisdiction to settle the title and bounds of land between adverse claimants, unless the plaintiff has some equity against the party claiming adversely to him. Therefore, upon a bill in equity by a vendor against vendee and a third person for specific execution of the contract for the sale of land, alleging that part of the land is in possession of and claimed by such third person, and praying that the rights of the vendor and the conflicting claimants may be ascertained, and, if the vendor has no right to the part of the land held by the conflicting claimant, that a proportionate abatement from the purchase money should be made: Held, the court of equity cannot properly entertain such bill as to the conflicting claimant." The same doctrine is held in *Steed* v. *Baker*, 13 Grat. 380. These Virginia cases were not alluded to in *Heavener* v. *Morgan*, and no authority is quoted for the second point in that case. "A court of equity has no jurisdiction to settle the title and boundaries of land when the plaintiff has no equity against the party who is holding the land." *Cresap* v. *Kemble*, 26 W. Va. 603; *Bright* v. *Knight*, 35 W. Va. 40, (13 S. E. 63); *Davis* v. *Settle*, 43 W. Va. 17, (26 S.. E. 557). The jurisdiction of this adverse claimant cannot be based on the mere idea of settling title. Against the claim that such adversary claimant is necessary party it is sufficient to say that he has no interest in or privity with the contract. I should

have cited above, among the authorities, the important case of *Fire Co.* v. *Lent*, 6 Paige 635. See what inconvenience would be produced in practice by holding that every adverse claimant must be a party; how it would protract and widen litigation, and bring in strangers to meddle in a contract with which they have nothing to do. The rule here contended for may be objected to on the ground that it leaves conflict of title unsettled, but that is foreign to the suit, and, as the lord chancellor said in *Tasker v. Small*, *supra*, "I cannot, to avoid an inconvenience in a particular case, sanction a proceeding which I consider inconsistent with the rules of pleading, and which might lead to much difficulty and confusion in the proceedings of the court." But there is another distinct reason against saying that such adverse claimant must, or can be, dragged into the controversy as a party; and that is based on his constitutional right to have his title passed on by a jury of his country in a court of law. Why shall he lose that inestimable right because other persons have sold and bought land to which he claims adverse title? We have seen from Virginia and West Virginia authorities anterior to *Heavner* v. *Morgan* that courts of equity did not assume jurisdiction to settle adverse title to land, and that in suits in the nature of specific performance they did not assume that jurisdiction. Thus, when our present constitution was adopted, courts of equity had not exercised this jurisdiction, and even the legislature could not thereafter confer such a jurisdiction, for trial of title to land is a trial of a right at common-law, requiring a jury; and in *Davis* v. *Settle*, 43 W. Va. 17, (26 S. E. 557) (Syl., point 6), it is held that "in matters of such nature as give right to trial by jury under the Constitution the legislature cannot give equity jurisdiction over them, and deprive the party of right of trial by jury against his protest." Hence Fox and Roles are neither necessary nor proper parties to this suit.

As necessary parties are not before the Court, we do not and cannot decide the merits of this case, but simply reverse the decree, and remand the cause for further proceedings in accordance with the principles above stated.

Reversed.

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CHARLESTON.

STATE *ex rel.* MATHENY *v.* COUNTY COURT OF WYOMING COUNTY *et al.*

Submitted January 17, 1900.—Decided March 31, 1900.

1. MANDAMUS—*Parties.*

A proceeding in *mandamus* is a civil proceeding,—a common-law process,—which may be in the name of the State at the relation of an individual, or simply in the name of the individual as plaintiff; that individual being in either case the real plaintiff. (p. 674).

2. CITIZENS OF COUNTY—*Interest.*

Citizens or taxpayers of a county may, merely by reason of their interest as such, maintain *mandamus*, in a proper case, to compel a county court to construct a new or repair an old court house. (p. 675).

3. MANDAMUS—*Return—Bar.*

Where a return to an alternative *mandamus* sets up new matter, good as a bar, the plaintiff must file a replication; else, such return will be taken as true, and call for judgment junction, even though the applicant for *mandamus* is not a of *non pros.*, dismissing the *mandamus*. (p. 676).

4. PLEADING—*New Matter—Answer.*

Any pleading setting up new matter, good in law, is taken for true. if not answered. (p. 677).

5. MANDAMUS—*Injunction—Party.*

A *mandamus* will not go to compel a party to violate an injunction, even though the applicant for *mandamus* is not a party to the injunction. (p. 679).

6. MANDAMUS—*Legal Right.*

A *mandamus* will go only to secure or protect a clear legal right, and not to accomplish a wrong, or the violation of the constitution. (p. 679.)

7. MANDAMUS—*Power—Performance.*

Mandamus will not go, if it would prove fruitless or impossible of performance, or beyond the power or means of the party to whom he is directed to perform its commands. (p. 680).

8. MANDAMUS—*Taxation—Debt.*

A *mandamus* will not go to compel a county court to build a new court house, when its construction would impose a debt

on the county beyond the means that can be raised by taxation, within the legal limit of taxation on the assessed valuation of property. (p. 680).

9. NEW COURT HOUSE—*Removal County Seat.*

A county court will not be compelled by *mandamus* to build a new court house pending a proceeding to remove the county seat. (p. 680).

Error to Circuit Court, Mingo County.

Mandamus by the State, on the relation of M. F. Matheny, against the county court of Wyoming County and another, to compel the building of a court house. Judgment awarding the writ, and defendants bring error.

Reversed.

A. W. REYNOLDS and JOHN M. MCGRATH, for plaintiffs in error.

H. K. SHUMATE, for defendant in error.

BRANNON, JUDGE:

M. F. Matheny, prosecuting attorney of Wyoming County, on behalf of himself as such, and as a citizen and taxpayer of said county, as well as for other citizens and taxpayers thereof, sued out an alternative writ of *mandamus* against the county court of that county, and the commissioners (by name) composing it, with the object of compelling the court to build a new court house for that county. The defendants filed a return setting up various facts in bar of the writ, and a jury trial was had, resulting in a verdict for the plaintiff, the State of West Virginia at the relation of said Matheny, and a judgment awarding a writ of peremptory *mandamus* compelling the county court to build such court house, from which judgment the county court obtained this writ of error. Matheny moved the court to dismiss the said writ, and thereupon Lewis B. Cook, George Chambers and F. B. Roach, stated in the order of the court to be resident citizens and taxpayers of the county, asked leave to be made relators in the case, and that it be prosecuted in their name and at their cost, in behalf of themselves and other citizens and taxpayers of the county; and the court dismissed the case as to Ma-

theny, both as citizen and prosecuting attorney, and ordered that the case be thereafter proceeded in in the name of and on behalf of said Cook, Chambers and Roach, as citizens and taxpayers as relators, and the other citizens and taxpayers of the county. Afterwards the county court moved the court to quash the alternative *mandamus* for the reason that it should not have been revived in the names of Cook, Chambers and Roach, without notice to the county court, but the court overruled the motion to quash.

One point of exception to the judgment is this refusal of the court to quash the writ. It is laid down in that very late and excellent work, 13 Enc. Pl. & Prac., which contains an elaborate and excellent treatise on *Mandamus*, at page 755, that: "When the relator in *mandamus* is the real party in interest, his death operates as an abatement of the action. Where the relator is a public officer, his death does not affect the proceedings, as they may be continued by his successor." It would seem plain that the writ cannot be revived by a personal representative after the death of the relator, as a general rule. I would say, however, that depends upon the right involved. Considering it a civil suit, as I do consider *mandamus*, I would think that, if the case happened to be one involving a right of property, it might be revived and prosecuted in the name of the personal or real representative of the deceased relator or plaintiff, as the case might concern personal or real property. In such a case as this, it seems to me, it could not be revived in case of death. Still, that does not show, but may tend somewhat to show that, as it could not be revived in the name of a representative (High, Extr. Rem. § 437), so, if the real plaintiff dismisses his suit, it could not be continued in the name of a substituted plaintiff, deriving no interest from the former plaintiff. Who is the real plaintiff in a writ of *mandamus*? I answer, the relator, not the State. It is true that the case of *State* v. *Long*, 37 W. Va. 266, (16 S. E. 578), tells us that the alternative writ should run in the name of the State, and that it should be entitled, "The State, at the Relation of (the petitioner,) against (the respondent;)" but it is also stated there that the practice in this State of entitling the cause in the name of the relator, as plaintiff, prevails. JUDGE LUCAS cites

several cases showing this. So that a writ of *mandamus* may be either in the name of the State of West Virginia, at the relation of a named individual, or merely in the name of that individual as plaintiff. I think that chapter 109 of the Code, and the case of *Fisher* v. *City of Charleston*, 17 W. Va. 595, and all other West Virginia cases, make this writ a civil action, purely. It is no longer a prerogative writ, any more than an action of debt; for, if a petition show a right in the person to the writ, he is entitled to it as a matter of right. In any view, the State is a mere figurehead, a nominal party, and Matheny was the real plaintiff; and it seems to me that, when he dismissed the suit, he being the only person named as plaintiff, the suit came to an end. Can mere citizens and taxpayers maintain a *mandamus* to enforce upon public officials the performance of public duties in matters concerning the public right? It would seem impolitic to allow every individual to interpose himself in public administration,—to intermeddle in it,—and thus produce litigation concerning public matters committed to public functionaries, except in cases where the attorney general or prosecuting attorney, or other officer to whom it falls by law to compel the performance of such public duty, refuses. There is great conflict of authority on the point. 13 Enc. Pl. & Prac. 630, says, that in the greater number of states a private relator, even where the matter concerns public right, must show a special interest in himself, while High, Extr. Rem. § 431, states that, though there is conflict, yet the preponderance of authority favors the right of an individual to the writ in cases touching the public right. In this State, I think the case of *State* v. *County Court*, 33 W. Va. 589 (11 S. E. 72), warrants the right of citizens and taxpayers, interested only as such, to have recourse to *mandamus* to enforce a public right. Still, that does not show that, when Matheny abandoned his writ, there was any right in Cook, Chambers and Roach to take up the cause, though Matheny had sued in behalf of all taxpayers. They must sue out a separate writ, showing cause and right for the same.

But, if I be wrong in this, the court erred in its procedure to revive. It revived without any notice to the county court, and in its absence, and before the day on which the

cause had been set for trial. When a suit abates, a *scire facias* to revive it must be awarded. When these parties proposed to have the cause, upon its dismissal in Matheny's name, go on in their names, why was not the defense entitled to notice, so that they might contest the important step of continuing the case in the name of these substituted parties? The defense was entitled to call upon them to show that they were citizens and taxpayers entitled to prosecute the case, and the defense was entitled to show legal grounds why they should not be allowed to do so. These parties offered no evidence to prove their right to sue, by affidavits or otherwise, as would be required of them if applying for a writ of their own. High, Extr. Rem. § 10. This point is virtually decided in *Fisher* v. *City of Charleston*, 17 W. Va. 627, where the court held it error to revive a case against new councilmen of the city, without notice to the adverse party.

Second point: The alternative *mandamus* alleges as the ground for the relief it seeks, that the present court house of Wyoming County is insufficient, and the return to it made by the county court denies that allegation of the *mandamus* and thus raises an issue upon the matter alleged in the writ; and it would seem that as to that matter no replication is necessary, since it could only be a general replication, and no *similiter* is required. But that return contains additional new matter set up in bar of the *mandamus*. It states that the county court in June, 1893, was about to erect a new court house at Oceana, the then and present county seat, and was enjoined from so doing by an injunction from the circuit court of Wyoming County, and that said injunction was still pending and in full force. It states as a further defense that afterwards, in November, 1893, the county court was taking steps to repair the present court house, so as to improve it for public use, and that in December, 1893, said circuit court awarded an injunction against the county court, restraining it altogether from making such repairs, and that this injunction still stood in full force. As a further defense the said return states that, upon the basis of the assessed property valuation for tax purposes in Wyoming County, a levy up to the highest limit allowed by law would not pay current expenses, and

furnish money to build such a new court house as the law now requries; and that, to raise money for such court house, it would be indispensable to have the authority of a vote of the people to create a debt on the county by the issue of bonds pursuant to the constitution, and that in 1894 the county court submitted to the people the proposition to issue the county's bonds to build a new court house, and that the proposition was defeated. The return, as further defense, stated that there was at its date a petition in circulation among the voters of Wyoming County praying the relocation of the county seat from Oceana to a place called "Jesse," and that the petition had been signed by more than two-fifths of the voters, and that it would be presented at the next term of the county court, and that the county court, did not, under such circumstances, deem it advisable, expedient, or proper to build another court house at the present county seat until after the question of the removal of the county seat had been voted upon. Now, if these additional defenses are good in law they required a replication from the plaintiff. No replication was filed to the return, or to any part of it. A demurrer to the return was filed and overruled, the court thus holding the return a good bar to the writ of *mandamus*, but there was no replication of fact. Therefore, under the rules of pleading, these new matters above specified must be taken as confessed for all the purposes of this case. It is an admission of their truthfulness. Steph. Pl. 216, says that "the effect of such admission is extremely strong; for, first, it concludes the party, even though the jury should improperly go out of the issue, and find the contrary of what is thus confessed on the record." 4 Minor, Inst. 913, says that the pleader admits, "for the purpose of the pending action, such of his adversary's averments as he does not deny." This principle is discussed in *Henry* v. *Railroad Co.*, 40 W. Va. 235, (21 S. E. 863), and in *McMillion* v. *Dobbins*, 9 Leigh 423. Thus, if these new points of defense be good, being admitted, in the absence of a replication, they called for judgment of dismissal by *non prosequitur*. *Henry* v. *Railroad Co.*, *supra*. Under that case, where there are two or more pleas, and one is good, though others be bad or found untrue, yet that defeats the action. Therefore,

no matter how the truth is on the issue made by the writ of *mandamus* and the return as to whether the present court house is sufficient or insufficient, the additional bar presented in the return would defeat the award of a peremptory *mandamus*. From this two results follow. One is that it was error to try the case by a jury, as was done, instead of entering a judgment by *non pros.*, dismissing the action; and the second result is that the verdict of the jury was found without any issue upon important matters presented as new matters in the return, and found their verdict in the teeth of and contrary to the admission of the truth of such new matters, by failure of the plaintiffs to make replication thereto. When the demurrer was overruled the plaintiffs were under obligation to file a replication, or have the return taken for true. "The proceeding may be dismissed where the relator fails to reply to the answer or file any further pleading." 13 Enc. Pl. & Prac. 795. Hogg, Pl. & Forms, § 283, properly states the invariable and logical rule of pleading when it says: "As we have already seen, the sufficiency of the plea as a valid or proper defense should be tested by motion to reject, to strike out, or by demurrer; and when this is done, and the plea is filed, then the plaintiff must take issue thereon, or make general or special replication thereto." So the defendant was entitled, when that demurrer to the return was overruled, to a dismissal of the *mandamus*, simply because the return, as to material points, was contessed as true. In addition, the verdict, being without any issue, is void, under numerous decisions. *Ruffner* v. *Hill*, 21 W. Va. 152. As I stated in *Henry* v. *Railroad Co.*, *supra*, the mere fact that the record states that the jury was sworn to try the issue, does not show that there was an issue proper, when the record does not show pleadings indispensable to raise the proper issues. This rule that a trial is abortive without an issue is well settled in the courts of record, though we have relaxed it in some cases before justices. It seems a very harsh rule, and technical, where, as in this case, both sides went on with the trial as if there were an issue; but the rule is very strong and solid, under the many decisions supporting it. In *Simpkins* v. *White*, 43 W. Va. 125, (27 S. E. 241), I criticised the rule, as I see

JUDGE HAYMOND did in *Griffe* v. *McCoy*, 8 W. Va. 201. But note that, as I said in *Henry* v. *Railroad Co.*, 40 W. Va. 240, (21 S. E. 863), the party who is guilty of the fault of failure to file such a pleading as raises an issue can with little grace complain of the rule. In this case the plaintiffs brought this trouble to themselves. It follows that the verdict for the plaintiffs was irregular and void, because without an issue, and because contradictory of the facts admitted by the failure of the plaintiffs to put in a replication to the return. The verdict should have been set aside, and the case dismissed.

Another point: The above holding is predicated upon the theory that the new matter above specified contained in the return constitutes a good bar to the *mandamus nisi*. Is this so? The county court had been enjoined from doing the very thing which this *mandamus* sought to compel it to do. It sought to compel that court to violate an injunction. It is laid down in 13 Enc. Pl. & Prac. 729, that "an injunction issued before the application for the writ (*mandamus*), enjoining the doing of the very acts sought to be compelled by the *mandamus*, is a sufficient defense." This rule is well sustained by authority. 14 Am. & Eng. Enc. Law, 105; High, Extr. Rem. § 23; 2 Spell. Extr. Relief, § 1402; *Ohio & I. R. Co.* v. *Wyandot Co. Com'rs*, 7 Ohio St. 278. In the last case the holding was, "The court will not, by *mandamus*, compel a party to do what by a subsisting decree of injunction he is prohibited from doing, although the party seeking the *mandamus* is not a party to the injunction." I think, however, that the injunction against a county court binds every citizen of the county, because that court represents every citizen, in the matter of the construction of a court house. Again, Article X., § 8, of the Constitution prohibits a county from the contraction of a debt, except by a vote of the people. This *mandamus* would compel the county court to violate this provision, which would be obviously improper. No citizen has a right to ask the court to contract such a debt without the assent of the people. In *People* v. *State Board of Canvassers*, 129 N. Y. 360, 29 N. E. 345, it is held: "A party can demand a *mandamus* only to secure or protect a clear legal right, never to accomplish a wrong or the violation of a con-

stitutional provision." If the county court obeyed the Constitution and statute law, it would have to disregard the *mandamus*, if issued. The award of the *mandamus* placed the county court "between two fires." If it obeyed the *mandamus* it must disregard an injunction and the Constitution. If it disregard the *mandamus*, it would be in contempt. Legally speaking, the *mandamus* would be in vain. There was no money with which to comply with it within the power of the county court. "It is a fundamental principle of the law of *mandamus* that the writ will never be granted in cases where, if issued, it would prove unavailing. * * * The solemn mandate of a court of justice should never be invoked to an end that is obviously useless." 14 Am. & Eng. Enc. Law, 104. Likewise, High, Extr. Rem. § 14; 2 Barton, Law Prac. 1213; 4 Minor, Inst. 331; 2 Spell. Extr. Relief, § 1377.

Again: It seems to me that the county court would not be bound to build a new court house at Oceana, if for no other reason, while the relocation of the county seat was not only in contemplation, but a petition had already been signed, ready to be presented to the county court, for a vote of the people on the removal of the county seat. It seems to me that the county court had, under such particular circumstances, discretion to postpone for a reasonable time action on the matter.

The defendant made a motion in arrest of judgment, which was overruled, but which should have been sustained. The principles above stated require us to reverse the judgment, and, rendering such judgment as the circuit court should have rendered, to arrest judgment upon the verdict, and set aside that verdict, and enter a judgment of *non pros.*, dismissing the alternative *mandamus*, with costs to the county court in both courts against Cook, Chambers and Roach.

Reversed.

CHARLESTON.

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MYNES v. MYNES *et al.*

Submitted January 13, 1900—Decided March 31, 1900.

1. MORTGAGE—*Payment—Presumption.*

On the 29th day of March, 1877, J. W. M. executed his three bonds or notes, of one thousand dollars each, to S., who on the 11th day of February, 1882, assigned and delivered same to M., the wife of J. W. M., who kept said notes and the deed of trust securing them in a trunk at the common home of J. W. M. and M., to which trunk M. kept the key until her death, in December, 1887. After the death of J. W. M., in July, 1894, the notes and deed of trust were found in the same trunk with some other papers of M., and some papers, also, of J. W. M., by his administrators, and by them delivered to the administrator of M. *Held*, that the possession of J. W. M. of said notes and trust deed, under the circumstances, does not raise the presumption of the payment or extinguishment of said notes. (pp. 690-691).

2. STATUTE OF LIMITATIONS.

After the statute of limitations has commenced to run, no subsequent disability will interrupt it. (p. 696).

Appeal from Circuit Court, Putnam County.

Suit by Phoebe Mynes against James M. Mynes and others. From the decree, Phoebe Mynes and Freda Mynes appeal.

Affirmed.

BROWN, JACKSON & KNIGHT, for appellants.

BOWYER & GREEN, for appellees.

MCWHORTER, PRESIDENT:

On the 29th of March, 1877, James W. Mynes executed a deed of trust on his home place, in Putnam County, containing about five hundred and eleven acres, and all the personal estate then in his possession, consisting of horses,

cattle, sheep, hogs, wagons, farming utensils, and grain, and everything on the said real estate, as set out in said deed of trust; conveying the same to John S. Smith in trust to secure to George H. Smith the payment of three bonds bearing the same date, for the sum of one thousand dollars each, payable to said George H. Smith or order, respectively, in one, two, and three years, with interest from date. It was provided that said Mynes should hold possession of all said property until the same should be required of him for sale in pursuance of said deed; that no sale of said property or of any part of it was to be made under the deed until after the expiration of said time of three years, without the consent of said Mynes first had thereto in writing. Margaret J. Mynes, the wife of James W. Mynes, died in December, 1887. In 1889 James married again. In 1894 he died, leaving his widow, Phoebe A. Mynes, and a daughter by the last marriage, Freda Mynes, about two years of age, and eight children by his first marriage. After his death his son James M. Mynes and his son-in-law W. P. McAboy were appointed his administrators, who found in an old leather trunk (which he had kept in his bed room for many years, and the key to which was delivered to the administrators by the widow, Phoebe A. Mynes), among the papers therein, the said deed of trust and the three one thousand dollars bonds secured therein, which bonds were on one piece of paper, and had the following indorsement thereon: "I assign the within notes to Margaret J. Mynes, with this deed of trust on record in Winfield, Putnam County, West Virginia, for value received of her the 11th of February, 1882. George H. Smith." After the finding of the deed of trust and notes or bonds, Oscar B. McAboy, a son-in-law of said James W. Mynes, was, at the instance of some of the children of Margaret J. and James W. Mynes, in the month of March, 1895, appointed administrator of the estate of Margaret J. Mynes, to whom the administrators of James W. Mynes delivered the deed of trust and notes, when the administrator of Margaret required the trustee, John S. Smith, to make sale of the property under the trust. He accordingly advertised the same to be sold on the 13th of April, 1895. Phoebe A. Mynes filed her bill in the circuit court

of Putnam County against the trustee, the administrators of James W. Mynes, and the eight children of James W. and Margaret J. Mynes, George H. Smith, and Freda Mynes, the infant, alleging that her husband died seised of the said five hundred and eleven acres of land, in which she was entitled to dower; that she was married to Mynes in 1889; that before their marriage, in 1877, he had executed the said trust deed to John S. Smith, trustee, to secure an apparent indebtedness of three thousand dollars, which was due by the terms thereof many years before her husband's death; that she was informed by him prior to his death that there were no liens or debts against the said home; that since his death George H. Smith had had the trustee to advertise to sell the same; that, if said alleged indebtedness ever had any legal validity, it was paid off and discharged or extinguished during her husband's lifetime; that Smith had made no effort to collect it from the administrators of said intestate, out of the large personal estate which came to their hands, while the debts were very small and inconsiderable; that said administrators and children of decedent by his first marriage were, or some one or more of them were, acting with said Smith in the attempt to sell said land for a pretended and ficticious debt, to defeat and destroy plaintiff's dower therein, and share of her said infant daughter therein; that, if there is any valid indebtedness secured by said trust deed, the personal estate left by decedent was the primary fund out of which payment should be made to exonerate the home place from liability therefor, and that no sale should be made until an accounting of the personal estate, and the same applied as far as possible in the payment of such indebtedness, if any such there be,—and prayed that George H. Smith be required to answer certain interrogatories set out, as to the consideration moving from him to said Mynes for said alleged indebtedness; as to his efforts to collect it in Mynes' lifetime, or from the administrators after his death; whether any, and, if so, what, payments, credits, set-offs, or counterclaims against the same; if so, the nature, amount, and extent thereof, where and how made or accrued; whether, in proceeding to enforce the trust, he was acting at the instance or request, or upon the wish or ad-

vice, of said administrators, or either of them, or of any of the children of said Mynes by his first wife; if so, which of them, and the reason or purpose given by any of them; that said Smith be required to file with his answer the deed of trust, and any and all evidence he might have of the existence of said indebtedness, including the note purporting to evidence the same, and that said administrators be required to disclose and set forth all the personal estate of said decedent, and any and all debts against the estate; and for an order of injunction to the sale of the real estate under said trust deed, and, if it should appear that there was any valid indebtedness secured by said trust deed, that the personal estate should be first applied, before selling said real estate to the payment thereof; and for general relief. An injunction was awarded. George H. Smith answered the bill, admitting the execution of the notes and deed of trust by Mynes, dated March 29, 1877; that he was the brother-in-law of James W. Mynes, Margaret J. Mynes being his sister; that no legal consideration passed from him to Mynes for the alleged indebtedness secured by the trust deed; that said James W. Mynes, being desirous of giving, transferring, assigning, and securing to his then wife, said Margaret J. Mynes (respondent's sister) the sum of three thousand dollars out of his estate, and securing the same thereon, made and executed the bonds and deed of trust to respondent on the express understanding, promise, and agreement that respondent would transfer and assign the same to said Margaret, and that in fulfillment thereof he did on or about the 11th day of February, 1882, so transfer and assign them to Margaret J. Mynes by written agreement, and delivered them to her, and that he had no further interest in the matter; that said bonds were not intended to represent any indebtedness from said Mynes to him, further than the intended gift or settlement upon his said wife, and that at the time of making said bonds and deed of trust, in order to avoid any misunderstanding, complications, or wrong application of said bonds or the proceeds thereof in case of death or otherwise of any of the parties to said transaction, before the same was completed by his assignment, respondent made his three several bonds, each for the sum of one thousand dollars, payable to Margaret

J. Mynes or order, at one, two, and three years, respectively, with interest from date, each bearing date March 29, 1877, and delivered the same to said Margaret J. Mynes; that he did not owe the said Margaret the said three thousand dollars, or any sum whatever; that said last three bonds were given her as indemnity or security until respondent should transfer and assign to her the said three bonds of James W. Mynes, and, at the time he assigned said last-mentioned bonds to her, Mrs. Mynes returned to him the bonds he gave her, and answered the interrogatories required to be answered. The eight children of James W. Mynes and Margaret J. Mynes filed their joint and separate answers, averring that the bonds and trust were executed by their father without any consideration from said George H. Smith, but upon the express purpose, understanding, and agreement that the same should be a gift, transfer, or settlement of the said sum of three thousand dollars, with interest thereon, by the said James W. Mynes to and upon his then wife, Margaret J. Mynes, the same to be secured upon the property therein embraced, and that at the time of the execution and delivery of said notes to Smith, he expressly promised and agreed to transfer and turn over the same to Margaret J. Mynes, to be held by her as her individual property, and that in pursuance thereof he did on or about the 11th of February, 1882, assign, transfer, and deliver them to her, and that the same remained in her possession till her death; that respondents did not know of the assignment of the notes to their mother until they were found in a package of papers about the 1st of March, 1895, said package having been taken from a trunk which was known as their mother's trunk in her lifetime, and to which she carried the key, and which was kept at the common home of herself and James W. Mynes, and which remained at the said home after her death, and soon after finding said notes they passed into the hands of O. B. McAboy, as admisintrator of said Margaret, who was requested by respondents, or some of them, to have the trustee proceed to execute the trust; that said bonds are valid, and constitute a good and subsisting claim against the estate of said decedent, James W. Mynes, and secured by said deed of trust, and which the representa-

tives of Margaret J. Mynes are entitled to have enforced and collected. Respondents deny that plaintiff, Phoebe A. Mynes, is entitled to dower in any portion of the real estate of which the said James W. Mynes died seised and possessed, because they say that in the lifetime of said James he purchased a house and lot in the town of Hurricane, in Putnam County, from H. M. Beckett, about the fall of 1889, and soon after his marriage with said plaintiff, and at his instance and request, said Beckett conveyed the said house and lot directly to the said plaintiff; that said house and lot were intended to be in lieu of dower of said Phoebe, and of all her interest in the estate of James W. Mynes, and the house and lot were accepted by her in lieu of dower and her interest in said estate; that it was a fair and liberal provision for her after the payment of claims against the estate.

At the July rules, 1895, plaintiff filed her amended and supplemental bill against all the parties named in the original bill, and making Oscar B. McAboy, administrator of Margaret J. Mynes, a party to the bill, alleging the finding of the bonds and trust deed in the old leather trunk kept in his bedroom by said James W. Mynes, in which he kept certain of his papers and effects, including a considerable sum of money; that a short time before his death he directed plaintiff to take from his pants his pocketbook, in which she would find the key of said trunk, which she did, and found the key in the pocketbook, which key she kept until after his death, when she delivered the key to one of the administrators; that since filing her original bill she had learned, and now alleges the fact to be, that in her said husband's leather trunk were found the said bonds and trust deed representing the said alleged indebtedness, and therefore avers and charges that said alleged indebtedness had been fully paid off and extinguished by her said husband in his lifetime; that said administrators of her husband, or one of them, illegally and wrongfully either delivered said bonds or notes to the said administrator of Margaret Mynes, or illegally and wrongfully permitted said last-named administrator to take possession thereof, which plaintiff charges was done fraudulently, and for the purpose of defrauding her and her infant child of their several

interests in said real estate,—and praying: That the defendants be required to answer under oath the amended and supplemental bill, and that the administrators of James W. Mynes and the administrator of Margaret J. Mynes be in like manner required to answer under oath, and to the best and utmost of their several and respective knowledge, remembrance, information, and belief, answer and set forth: "(1) Whether it is not true that your oratrix delivered the key of said leather trunk to the said administrators of her said husband or one of them. (2) Whether it is not true that papers and effects of her said husband were found in said leather trunk after his death, and, if so, what papers and effects. (3) Whether it is not true that said trust deed from her husband to John S. Smith, trustee, was found after her husband's death in said leather trunk. (4) Whether it is not true that the bonds or notes mentioned in said deed of trust, and representing said alleged indebtedness, were not found after her husband's death in said leather trunk, and, if not found therein, where they were found. (5) Whether it is not true that her husband's administrators, or one of them, delivered said bonds or notes to the said administrator of Margaret J. Mynes, or permitted said last-named administrator to take possession thereof. (6) When, where, and how, and from whom, the said administrator of Margaret J. Mynes got possession of said bonds or notes. (7) Whether any changes, additions, alterations or erasures have been made in said bonds or notes since the death of James W. Mynes; if so, to what extent, in what manner, when and by whom made." That the administrator of Margaret J. Mynes be compelled to file with his answer the bonds or notes, and to state whether at the time of filing the same they are in the same plight and condition as they were at the time of the death of James W. Mynes, and whether there have been any changes, additions, alterations, or erasures in them, or any of them. And for the relief prayed for in the original bill, and that the trust deed and indebtedness and said bonds or notes be decreed fully paid and satisfied, and for general relief.

Oscar B. McAboy, administrator of Margaret J. Mynes, filed his answer, and says, that among the assets of his de-

cedent, which came to his hands, were the three bonds or notes described, made by James W. Mynes to George H. Smith, and delivered to Smith on the 29th of March 1877, and afterwards, on the 11th day of February, 1882, said Smith by written assignment, indorsed on said bonds, transferred the same to Margaret J. Mynes, and filed the same with his answer; refers to the answer of George H. Smith to the original bill as containing what he believes to be a true account of said transaction; denies that said bonds, or either or any part thereof, were ever paid to him as administrator, or to any one else, but avers that they are still due and wholly unpaid, and are assets in his hands as such administrator, and a valid claim against the estate of James W. Mynes, and a lien on the land and property conveyed in said deed of trust, and that he requested the trustee to advertise and sell under the trust; that respondent's first wife was a daughter of James W. and Margaret J. Mynes; that he was frequently at their home, and that it was true there was a trunk of the description spoken of in these proceedings at their common home, to which Margaret kept the key in her possession during her lifetime, and he believes it remained in the possession of James W. Mynes thereafter up to the time of his death; that it was turned over to his administrators by plaintiff; that respondent was one of the appraisers of the estate of James W. Mynes, and that, when the trunk was opened at the time of the appraisement, they found in said trunk individual papers of Margaret J. Mynes among other papers therein, but little examination of her papers was made, and the bonds in question were not discovered at that time. Respondent denies any illegal or fraudulent intent on his part in getting possession of the bonds, or that the same was done fraudulently or for the purpose of defrauding plaintiff or her child, or is seeking to collect the same with any such purpose or intent, but simply to discharge his duty in that behalf,—of administrator. In response to the interrogatories: It is true that plaintiff delivered the key to James M. Mynes, one of the administrators; that the papers of James W. Mynes were found in the trunk after his death; that all of the papers produced to the appraisers, as far as he knows, came from the trunk. Remembers among them

some tax tickets and other receipts, and also the notes, etc., placed on the appraisement bill. There were also in said trunk some individual papers of Margaret J. Mynes, an organ receipt, an organ contract, and some tax tickets, but did not examine her papers. The only other effects of said James W. Mynes taken from said trunk was a pair of pants, which respondent was informed, believes, and alleges were his first wedding pants. That the trust deed was found in said trunk after the death of said Mynes; also, the bonds. That it is true W. P. McAboy, one of the administrators, delivered the bonds to respondent after he requested it. That he knows nothing of the bonds, of his own knowledge, until about the time they came to his hands as administrator, and they have ever since been in his possession. That no changes or alterations have been made in them, or either of them, since they came to his possession, and that said bonds and assignment are in the same plight and condition as when delivered to him, and, he believes, in the same condition as when found, and at the death of said Mynes. Avers that the personal property mentioned in the deed of trust has been so scattered that the same cannot now be ascertained and identified in order to subject the same to the payment of said debt, and the personal property left by Mynes is wholly insufficient to pay off and discharge the bonds, but alleges that, in addition to the real estate mentioned in the trust deed, Mynes died seised of valuable real estate in the city of Huntington; and prays for dissolution of the injunction and sale of the property, and, if the proceeds should not be sufficient to pay the bonds, that the residue may be paid out of the residue of said estate of James W. Mynes, both personal and real.

Freda Mynes, the infant defendant, answered by guardian *ad litem*, and joined her mother in her prayer for relief.

Appellants contend that the main question involved in the case is: "Are the three bonds of March 29, 1877, executed by James W. Mynes to his brother-in-law George H. Smith, to be deemed surrendered and satisfied?" And that the solution of the question depends on whether the theory of the plaintiff, that the bonds secured by the trust

deed were intended to protect the property of Mynes against some threatened liability, or that of defendants, that it was intended by Mynes to make a settlement of the amount of the bonds and their interest on Margaret J. Mynes, his wife, is true; contending that, if plaintiff's theory is correct, the exchange by Smith of these bonds to Mrs. Mynes for the bonds Smith had executed to her, bearing the same date, on the 11th of February, 1882, five years after the execution of said bonds, was an extinguishment of both sets of bonds. It appears that no consideration passed from Smith to Mynes for the bonds, but that the bonds were executed for the benefit of Mrs. Mynes, and Smith executed the bonds to Mrs. Mynes, to be held by her until Smith should transfer and assign the Mynes bonds to her, which, it seems, he agreed and promised to do. It is hard to conceive why he did not assign the bonds at once, as he did five years afterwards, instead of executing and having outstanding all that time his own bonds; and he makes no explanation. It was no more trouble to write the assignment than the notes, but is it material which theory is correct? In either case it is a voluntary transaction, which would not be good as against then existing creditors, but good between the parties. *Billingsley* v. *Menear*, 44 W. Va. 651, (30 S. E. 61); *Harris* v. *Harris' Ex'r*, 23 Grat. 737. What object there would be in making the property over to his wife, we cannot well see, unless he was intending to provide against his own future acts in becoming involved in debt. Surely the reason given by Smith was a lame one,—"that Mynes might die, and his wife marry some fellow and squander the property;" for, if he had died without making the bonds and trust, the property would have gone to the heirs, subject only to the marital rights of the widow, and the "fellow" she might marry could squander nothing but her interest, while the bonds and trust would put it all in such fellow's power, she consenting. Appellants say that it is conceded that at least from the death of his first wife, in December, 1887, until his own death, in July, 1894, a period of nearly seven years, Mynes had possession of the trust deed and bonds, and that such possession was *prima facie* evidence that the bonds were extinguished, and cites several au-

thorities to that effect. In *Tedens* v. *Schumers*, 112 Ill. 263, it is held: "The fact that a due-bill is found in the hands of the maker is *prima facie* evidence of its payment; and the payee, suing on the same, is required to overcome the presumption by a preponderance of evidence before he can recover." *Lipscomb* v. *DeLemos*, 68 Ala. 592; *Chandler* v. *Davis*, 47 N. H. 462; *Hays* v. *Samuels*, 55 Tex. 560. This is good as an abstract proposition of law, but is the possession of James W. Mynes such as to raise a presumption of payment? Would not the circumstances of his possession themselves overcome the presumption? These notes at the date of assignment were delivered to Margaret J. Mynes by the payee, George H. Smith. They were found in the trunk in which Margaret kept her papers, and to which trunk she kept the key up to the time of her death. It was only the death of Margaret J. Mynes that gave him the possession of the notes. He did not, prior to that event, have exclusive possession and control of them. They were in her trunk at their common home, and after her death there was no one to make demand for or inquiry about the bonds until a personal representative should be appointed of her estate. I do not think James W. Mynes' possession of the bonds at the time of his death was such as to raise the presumption of their payment or extinguishment. Appellants say the exchange of the bonds at the time of the assignment, February 11, 1882, was an extinguishment of both sets of bonds. There is no question but that it extinguished those made by Smith to Mrs. Mynes, but surely not those assigned by Smith to Mrs. Mynes, which were at that time delivered to her, and transferred by the payee by written assignment; and this assignment and delivery of the bonds of Margaret J. Mynes, took place in the presence of the grantor, James W. Mynes, and, it seems, with his assent, which is a very strong indication that he intended the bonds for her benefit. In their petition for appeal, appellants give eight reasons for the theory that the transaction was not intended as a marriage settlement upon the first wife of James W. Mynes, the seventh of which is that (the payee in the bonds, and who assigned them to Mrs. Mynes) "Smith permitted his own son to buy a part of the farm covered by the trust deed, and to build

upon and improve it, and never said a word about the trust deed." Appellees, in their brief in reply to said several reasons, in reply to the seventh say: "Smith does not seem to have known anything special about the purchase of a part of the land by his son. But, if he had, as the land had been first sold to James Mynes, a son of Mr. and Mrs. Mynes, and then sold by him to Geo. S. Smith, a nephew of Mr. and Mrs. Mynes and first cousin of James, he might well suppose that with such near relatives, and all in the family, he would be well protected in his purchase." Unless Mr. Smith has something outside of this record to rely upon, I am unable to see what encouragement he can have that his purchase will be well protected on account of near relationship, when he is in the hands of the same parties who are doing all they can to defeat their stepmother and their baby sister in recovering what they are morally entitled to. Some people will not permit blood or relationship to stand between them and any legal rights. It is not probable that the residue of the real estate will come near paying the decree, so that the land purchased by George S. Smith will be liable for any balance remaining on the decree. The evidence of George H. Smith, which is the only direct evidence as to the object of James Mynes in making and securing the bonds, is very positive, while the reasons therefor are not the soundest or best. The evidence introduced by plaintiff tending to show that Mynes claimed to have taken up or extinguished said bonds is vague and uncertain. On the evidence the circuit court found the facts in favor of defendants, and there is certainly no such preponderance in favor of the plaintiff as would authorize the appellate court to reverse the judgment on the facts, whatever its desire might be, excited by its view of the moral aspect of the case. *Smith* v *Yoke*, 27 W. Va. 639; *Bartlett* v. *Cleavenger*, 35 W. Va. 720, (14 S. E. 273); *Richardson* v. *Ralphsnyder*, 40 W. Va. 15, (20 S. E. 854); and subsequent cases. Yet the evidence on behalf of the plaintiff in the case at bar is hardly sufficient to bring it within the purview of the cases cited. I do not see how the circuit court could have held otherwise than it did.

Appellees assign a cross error,—that the court improperly held that the statute of limitations barred the said

notes, and each of them, and that the same, or any part thereof, are not entitled to be paid out of the personal estate of the said James W. Mynes, nor out of any of the other real estate belonging to him, except that conveyed in the deed of trust to secure the said notes,—and cite *Righter* v. *Riley*, 42 W. Va. 633, (26 S. E. 357), in support of the proposition. The appellants make no mention of this in their brief, and I do not remember that it was referred to by either party on oral argument. It is held in *Righter* v. *Riley*, that "the claim of a wife against the husband is not barred by the statute of limitations during coverture, if at all, until twenty years from the original inception or written renewal thereof." This is based on the fact that because of "coverture, and their recognized subjection to the control of their husbands, they are especially exempted from the operation of the statute," as stated in the opinion in said case, which flows from the old common-law doctrine that the wife could not sue the husband at law. Code 1868, chapter 104, section 3, provides that "if, at the time at which the right of any person to make entry on, or bring an action to recover, any land, shall have first accrued, such person was an infant, married woman, or insane, then such person, or the person claiming through him may, notwithstanding the said period of ten years shall have expired (except in the case of a married woman when such land is her sole and separate property), make an entry on or bring an action to recover such land within five years next after the time at which the person to whom such right shall have first accrued as aforesaid shall have ceased to be under such disability as existed when the same so accrued, or shall have died, whichever shall first have happened." This is taken from Code Va. 1860, chapter 149, section 3, without change except as to time of limitation, and that contained in parentheses, excepting therefrom the case of a married woman when such land is her sole and separate property. Section 16 of said chapter 104, relating to the limitation of personal actions, is section 15 of said chapter 149, Code 1860, re-enacted, with the like parenthetical change, "except in the case of a married woman, as provided in section three of this chapter;" that is, in personal actions relating to her sole and separate property. The same

Code (section 12, chapter 66) provides that: "A married woman may sue and be sued without joining her husband in the following cases: (1) When the action concerns her separate property. (2) When the action is between herself and husband. (3) When she is living separate and apart from her husband. And in no case need she prosecute or defend by guardian or next friend." The word "action" has a legal signification, and does not apply to a suit or proceeding in equity. The legislature clearly intended to give her the right to sue her husband or any one else in a case in which her separate estate is concerned. What would be the sense in providing that she should sue and be sued without joining her husband, "when the action is between herself and husband," when he can neither sue her, nor can she sue him, and consequently no action can exist between them? It is not only clearly provided that she may have her action against him, but it is as clearly provided in section 16, chapter 104, Code 1891, that, in case the subject-matter of the action is her sole and separate property, her coveture is not a disability, and does not prevent the statute from running. In *Miller* v. *Cox*, 38 W. Va. 747, (18 S. E. 960), it is clearly indicated in the syllabus that the statute of limitations runs against the wife during coverture. That was a case in which, during the pendency of an action against a husband for the purpose of obtaining a judgment on a note made by him, he executed a deed of trust on his real estate to a trustee to secure the debtor's wife the payment of a sum of money which he claimed she had loaned to him, which he had used in his business, and which, as stated in the first point of the syllabus, was barred by the statute of limitations when the deed of trust was executed; and the fifth point of the syllabus holds: "If at the date of said trust deed the claim thereby sought to be secured is barred by the statute of limitations, that fact has a strong tendency to defeat said trust deed as a lien in favor of the wife against *bona fide* creditors of the husband." Also, in *Bank* v. *Atkinson*, 32 W. Va. 203, (9 S. E. 175), (Syl., point 2): "If, when such purchase is made, any claim which she may have on him for such proceeds of her real estate is barred by limitation, that circumstance tends strongly to repel the wife's

claim to exempt the land against creditors." In *Bennett* v. *Bennett*, 37 W. Va. 396, (16 S. E. 638), this question is pretty fully discussed and good reasons given why the wife should be permitted to sue, among other things, for the protection of her own rights against other creditors, who may obtain judgment liens and absorb the husband's estate, leaving her without relief. JUDGE BRANNON, in writing the opinion of the Court in the case, says, "The tendency of decisions seems to be that way," and says: "In *Alexander* v. *Alexander*, 85 Va. 353, (7 S. E. 335), 1 L. R. A. 125, the opinion supports the right to sue the husband at law, because of the married woman's act. But the common law prevails with us. and under it a wife cannot contract with her husband; and chapter 66, Code, giving her the right to hold separate property, has not given her capacity to contract at law, or to contract with her husband." In *Scott* v. *Scott*, 13 Ind. 225, it is held that the wife may sue her husband, in respect of her separate estate, under their statute, which is almost identical with ours, and provides: "When a married woman is a party her husband must be joined with her; except: First, when the action concerns her separate property, she may sue alone; second, when the action is between herself and husband, she may sue or be sued alone." The court say: "This section seems to fully warrant the suit," and further say, "After the passage of the Code, the legislature provided in effect, that her personal property should be her separate property, and it follows that she may sue her husband or any one else in respect to it." And in *Wright* v. *Wright*, 54 N. Y. 437, it is held that: "A note given in consideration of a promise to marry is valid in the hands of the wife after marriage, and an action may be maintained thereon by her against her husband. It is immaterial whether the form of the action by the wife against her husband upon such a note be at law or in equity, if facts are stated entitling the plaintiff to the relief demanded. It is the duty of the court to afford the relief, without regard to the name to be given to the action. It seems that, under the present policy of this State in respect to the relations of husband and wife, the latter can sue the former to enforce any right affecting her separate property in any form of ac-

tion, the same as if he were a stranger." *Wilson* v. *Wilson*, 36 Cal. 447. How can the common law prevail with us, when we have a statute in contravention of it? It is the duty of the courts to give full force to statutes when it clearly appears therefrom that such statutes were intended by the legislature to contravene the common law. But, however this may be, these bonds were made payable to and held by George H. Smith, dated March 29, 1877, and assigned by him to Margaret J. Mynes on the 11th day of February, 1882. The statute began to run several years before the bonds were assigned by Smith to Mrs. Mynes. "As a general rule, when the statute of limitations is once in motion, nothing can interrupt it." 13 Am. & Eng. Enc. Law 731. In *DeKay* v. *Darrah's Adm'rs*, 14 N. J. Law, 288, 294, it is said, "The course of decisions, both in England and in this country, has established the rule, beyond doubt, that, when the statute has commenced running, it runs over all subsequent disabilities and intermediate acts and events." And in *McDonald* v. *Hovey*, 110 U. S. 619, 4 Sup. Ct. 142, 28 L. Ed. 269, Justice Bradley says, in speaking of the statute of limitations, "And after it has commenced to run, no subsequent disability will interrupt it." In *Doe* v. *Jones*, 4 Term R. 300, Lord Kenyon says, "I confess, I never heard it doubted, until the discussion of this case, whether, when any of the statutes of limitations had begun to run, a subsequent disability would stop their running." See authorities cited in note 3, p. 732, 13 Am. & Eng. Enc. Law; *Jones* v. *Lemon*, 26 W. Va. 629; *Parsons* v. *McCracken*, 9 Leigh 495; *Caperton* v. *Gregory*, 11 Grat. 505; 1 Rob. Prac. (N. S.) 609; 1 Bart. Ch. Prac. § 34; Ang. Lim. §§194, 197; *Sherman* v. *Stage Co.*, 24 Iowa. 515. The statute of limitations having commenced to run, and having been running some years on the bonds in the hands of George H. Smith before they were assigned to Mrs. Mynes, under these authorities, and others therein referred to, if Mrs. Mynes was under the disability claimed, such disability would not interrupt the running of the statute. For the reasons herein stated, the decree must be affirmed.

DENT, JUDGE:

I concur in the conclusion in this case, but not with that portion of JUDGE MCWHORTER'S opinion which tends to abrogate the common law disability of husband and wife to enter into valid legal contracts with each other during coverture. He unwittingly falls into the same error inadvertently committed by JUDGE BRANNON, in the case of *Bank* v. *Atkinson*, 32 W. Va. 203, (9 S. E. 175), and followed by JUDGE ENGLISH, in *Miller* v. *Cox*, 38 W. Va. 747, (18 S. E. 960). This arises from a misconstruction of the statute authorizing a married woman to sue and be sued without joining her husband, which was made a part of the code law of this State as early as 1868. In 1877 this Court, in the case of *Stockton*, v. *Farley*, 10 W. Va. 171, this provision being involved (JUDGE GREEN, delivering the opinion), held, "In this state a common law suit cannot be brought against a married woman on any contract made by her while married and living with her husband." And in 1886, the same statute being under consideration, this Court held (JUDGE SNYDER, delivering the opinion) that "a note given by a husband directly to his wife during coverture is void, and no action at law can be maintained upon it against the husband." *Roseberry* v. *Roseberry*, 27 W. Va. 759. In commenting on the statute, JUDGE SNYDER says, on page 760: "A careful examination of this chapter will fail to show any change in the common law respecting the right or power of a wife to contract with her husband. This statute deprives the husband of his marital rights in the property of his wife, and confers upon her a legal separate estate in her property. It also gives her the right to acquire property, in certain cases, from persons other than her husband, and to sue and be sued without joining her husband in specified cases, but it nowhere and in no manner authorizes or enables her to contract with her husband in any case." And in the case of *Carey* v. *Burress*, 20 W. Va. 571, it was held (JUDGE GREEN, delivering the opinion) that "a married woman cannot be sued in a court of law in this State on any contract made while living with her husband," for the reason (given) that a married woman has no capacity, while living with her husband, to enter into any contract. See, also, *Peck* v.

Marling's Adm'r, 22 W. Va. 708. In *White* v. *Manufacturing Co.*, 29 W. Va. 385, (1 S. E. 572), it was held that a judgment against a married woman, rendered upon a contract made during coverture, was an absolute nullity, because of her incapacity to contract. In *Picken's Ex'rs* v. *Kniscley*, 36 W. Va. 794, (15 S. E. 997), the incapacity of a married woman living with her husband to make valid contracts, suable at law, either by or against her, is strictly adhered to, as held in the foregoing cases (JUDGE BRANNON delivering the opinion). In the case of *Bennett* v. *Bennett*, 37 W. Va. 396, (16 S. E. 638), (the same judge delivering the opinion), it is again reiterated that a married woman "cannot sue her husband at law, because she cannot contract with him at law." *Bank* v. *Atkinson*, and *Miller* v. *Cox*, were both causes having their inception before the changes made in the married woman's statute in 1891, and thus were decided as the law stood under the foregoing decisions. In harmony with the inability of a married woman to make valid contracts during coverture are the cases of *Rogers* v. *Lynch*, 44 W. Va. 94, (29 S. E. 507), (opinion by JUDGE ENGLISH); *Stewart* v. *Assurance Co.*, 45 W. Va. 734, (32 S. E. 218), (opinion by JUDGE MCWHORTER,); and *Schamp* v. *Association*, 44 W. Va. 47, (28 S. E. 709), 44 L. R. A. 101, (opinion by JUDGE BRANNON). The last case arose under the code of 1891. Under this statute a married woman was permitted to acquire property from even her husband, but she could only charge it in a certain manner, and she could only be sued as to such charges in chancery, for she was not personally bound for them. The amendment of 1893 again took away her right of acquiring property from her husband. Acts 1893, chapter 3. In this respect the law was restored as it existed in 1868, and there is no provision therein contained abrogating the common-law disability of husbsnd and wife living together to enter into contracts with each other, enforceable in a court of law. Section 3 expressly preserves this disability by providing that she can acquire property "from any person other than her husband." While section 15 provides that she "may sue or be sued in any court of law or chancery in this State, which may have jurisdiction of the subject-matter, the same in all cases as if she were a *feme sole*,"

it does not remove her common-law disability, while living with her husband, to contract with him. If such were the case the provision in section 3, before referred to, would be nullified, and section 14, providing that "a married woman living separate and apart from her husband may in her own name carry on any trade or business," becomes unnecessary. Section 12 secures her earnings as her separate property, but this does not authorize her to charge him wages for services, nor him to charge her for her board and clothes. If the common-law relation of marriage is wholly nullified by the statute, so as to allow husband and wife to contract with each other as though single, then the law would imply contracts between them as for services rendered, moneys expended, etc., and the marriage relation would become one of dollars and cents, instead of a matter of mutual love and affection, for which there could be no such thing as a money compensation. It is undoubtedly true that the mercenary spirit of the times is tending in this direction, as man becomes more and more the slave, and Mammon more and more the master; but such an unfortunate climax has not yet been reached, but in the homes of this State mutual affection is still the sacred tie that binds husband and wife together, and the law still recognizes such to be the true nature of their relationship to one another, and leaves their mutual dealings to be heard and determined by a court of chancery, with power to dissolve the marriage relation. The contracts between husband and wife during coverture, while living together, thus being cognizable only in equity, having jurisdiction of the subject-matter, the statute of limitations can have no application to them. This was the conclusion reached by the Court in the case of *Righter* v. *Riley*, 42 W. Va. 633, (26 S. E. 357). For admitting that a wife may sue her husband at law as to her separate property, and that the statute of limitations bars such suits, yet, as she cannot acquire property from him, nor contract with him, a suit at law as to such property or contract would not be concerning her separate property, and he could plead coverture in bar thereof. Hence it would not come under the exception as to suits regarding her separate property, and her disability consequently would prevent the running of the stat-

ute, at least for twenty years. But the better conclusion is that a married woman's right to property acquired of her husband during coverture is purely equitable, and not legal, and no action accrues to her, therefore, during her disability.

Affirmed.

CHARLESTON.

HALE *v.* WHITE *et al.*

Submitted January 23, 1900—Decided March 31, 1900.

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1. EQUITY—*Legal Right Inadequate.*

A general creditor of a deceased person cannot sustain a bill in equity on a purely legal demand, unless he shows that he has exhausted his legal remedy, or that such remedy, for some good cause, would be inadequate or unavailing. (p. 703).

2. ADMINISTRATOR—*Account—Equity.*

A personal representative who has filed the inventories and made his annual statements of account as required by chapter 87 of the Code cannot be called on to restate such accounts, in equity, unless the accounts already rendered by him are, for some sufficient reason, surcharged and falsified. (p. 705).

3. EQUITY—*Bill—Jurisdiction.*

Where the bill shows that the estate is solvent and the assets superabundant, the mere pretext of the want of discovery will not give equitable jurisdiction against a personal representative who is not shown to have neglected any of the statutory requirements relating to his duties as such representative to the injury of the plaintiff. (p. 705).

Appeal from Circuit Court, Mercer County.

Action by Mary D. Hale against James A. White, administrator, and others. Decree for plaintiff and defendants appeal.

Reversed.

RUCKER & KELLER and W. B. KEGLEY, for appellants.

JOHNSTON & HALE, for appellee.

DENT, JUDGE:

In the chancery cause of Mary D. Hale against James A. White, etc., from the circuit court of Mercer County, the following statement is adopted from plaintiff's brief: "On the 5th day of May, 1880, Margaret J. Hale, the ancestor of the plaintiff, leased certain mineral properties owned by her in the county of Franklin, state of Virginia, to one Robert F. Mason, for certain annual rents or royalties, and which lease was to run for the period of twenty-five years, and to expire in the year 1905. This lease and the rents thereunder, subsequently, by the death of Margaret J. Hale and a partition of the said real estate of said Margaret, became the property of the plaintiff and her sister, Jane S. Hale. Afterwards, and pending a suit between the said Hales and said Mason for the recovery of the rents due upon or under the said lease, to wit, on the 12th day of July, 1888, a contract was entered into between the said Hales, Mason, and the defendant, M. M. Rogers, whereby said suit was settled and compromised, and said leases assigned by said Mason to said Rogers; the latter assuming the payment of said rents upon or under said lease, and covenanting that the said lease upon the said land so leased should yield to the said plaintiff and her sister, Jane S. Hale, one hundred and fifty dollars each year thereof from the 6th day of September, 1887, whether the mines on said lands were worked or not, etc., which said contract was reduced to writing, duly signed, and acknowledged. Contemporaneously with this contract the said Rogers, with J. H. Bramwell, executed to the said plaintiff and her sister, Jane S. Hale, a bond for two thousand dollars, with interest, for the payment of said rents. After the execution of this contract, to wit, on the 4th day of October, 1888, the said Jane S. Hale intermarried with defendant, Carter

Berkley. Jane S., the wife of Dr. Berkley, died in Virginia on the 28th day of May, 1889, intestate and without issue. Her estate and interest in this lease and the rents derived therefrom became the property of her husband, Dr. Berkley. Code Va. 1887, § 2557. After the death of Berkley's wife, he assigned, in writing, the said interest to the plaintiff; thereby vesting in the plaintiff the whole beneficial interest in and under said lease and the said bond of Rogers and Bramwell, and the right to recover the whole of said rents. A large amount of rents accrued and became due and in arrears, and demand was made on defendant Rogers for the payment; and, he failing to pay, the plaintiff on the —— day of July, 1897, instituted this suit to recover the same. To the plaintiff's bill the defendants, Bramwell's executors, filed a demurrer and an original and amended answer, to each of which answers the plaintiff replied generally, and depositions were taken and filed. On the 1st day of December, 1898, and again on the 11th day of March, 1899, the Consolidated Mining Company, a corporation, tendered petitions, and asked leave to file same in this cause, and each of which the court refused to permit to be filed. Such proceedings were had in the said cause, when on the 11th day of May, 1899, a decree was rendered by the court in favor of the plaintiff against the defendants, the executors of said Bramwell, for the sum of one thousand two hundred and thirty-nine dollars, and the costs of the suit, from which decree the said defendants, Bramwell's executors, have obtained an appeal to this Court."

Six grounds of error are assigned by appellants, to wit: "(1) The court erred in overruling the demurrer of petitioners to plaintiffs' bill. (2) The court erred in assuming jurisdiction of the case, and the bill should have been dismissed for want of jurisdiction. (3) The court erred in decreeing in favor of the plaintiff for any part of the amount claimed to be due on account of the interest of Jane S. Berkley (formerly Hale). (4) The court erred in not dismissing this cause upon the hearing because there was no evidence that the leases under which the bond sued on in this case was given were still in existence and unexpired. (5) The court erred in refusing to permit the Consolidated Mining Company, a corporation, to become a

party to this cause upon its several petitions, tendered to the court, praying to be permitted to make defense to the bill herein. (6) Because the court erred in failing to decree that the amounts admitted in plaintiff's bill to have been paid on the bond sued on in this case, amounting to about three hundred and ninety-three dollars and seventy-five cents, should be credited thereon."

The first question for consideration is the demurrer to the bill. The will of J. H. Bramwell, deceased, is filed as an exhibit, from which it appears that his estate is very large, and all of which is charged with the payment of his debts. There appear to be no debts against the same but the plaintiff's so there can be no possible question as to the sufficiency of the assets. The bill alleges that plaintiff does not know the amount or character of the assets, or what disposition the executors have made of them, and therefore she prays a discovery. There is no allegation that they have not returned the inventory and made the annual settlements required by law, or that they were in any manner concealing the assets or disposing of them illegally, or that they had refused to pay any just claim against the estate, so that the prayer for discovery and account must be treated as merely colorable. So the inquiry is narrowed down to the question whether a creditor of a deceased person had the right, in the first instance, to institute a chancery suit on a claim, admitted or disputed, against the personal representative, full-handed with assets, without regard to the conduct of such personal representative in the administration of such assets. In other words, has a creditor the right to disregard an adequate remedy at law, and sue on a mere legal demand, in a court of equity? The present remedies of the creditor of a deceased person are as follows: (1) An action at law against the personal representative. Section 19, chapter 85, Code. (2) A separate bill in chancery to compel payment of his individual debt out of the funds in the hands of the personal representative, and discover the funds or estate liable to the payment thereof. Story, Eq. Pl. §§ 99-102; 2 Tuck. Bl. Comm. 425; *White* v. *Bannister's Ex'rs*, 1 Wash. (Va.) 168; *Duval's Ex'r* v. *Trent's Devisees*, 6 Mumf. 29; *Clarke* v. *Webb*, 2 Hen. & M. 8. (3) A bill in

behalf of himself and other creditors to ascertain and distribute both the real and personal estate. This is subject to the right of the personal representative to bring such suit within six months from his qualification. Section 7, chapter 86, Code. (4) A bill against an heir or devisee because of assets by descent. Section 6, Chapter 86, *Id.* The remedies given in the case of *Poling* v. *Huffman*, 39 W. Va. 322, (19 S. E. 421), are the common-law, and not the statutory, remedies. In the present classification the third and fifth classes, as given in the case referred to, are combined in the second class, as being so closely related to each other as hardly to require a separate classification, as the remedy in such case is dependent on the neglect of duty or misconduct of the personal representative. To entitle a creditor to institute his suit under either of the three last heads enumerated, he must have either exhausted his remedy under the first,—being the legal remedy,—or show that such remedy would for some reason be unavailing, or that the personal representative had neglected his legal duties to such an extent as to justify the interposition of a court of equity. If, for instance, the personal representative has failed to file the inventory required by section 2, chapter 87, Code, or the account of sales required by section 3, *Id.*, or make his annual statements or settlements as required by section 7, *Id.*, and the creditor is thus prevented from knowing the true condition of the estate, although he might compel such personal representative to settle his accounts under section 8, *Id.*, nevertheless he will be entertained in equity, as giving a more complete and adequate remedy; and then, if the personal representative admits assets, he may have a decree for his debt, if just, for the reason that, the court having taken jurisdiction because of the neglect of duty on the part of the personal representative, such jurisdiction cannot be evaded by the admission of assets, but the court will go on to complete justice between the parties. An admission of assets renders a statement of accounts unnecessary, but cannot defeat the equitable jurisdiction which has already attached. But where the personal representative is faithfully discharging his duties, and is full-handed with assets, and the only question involved is the justness of plaintiff's

legal demand, equity has no jurisdiction. Section 5, chapter 87, Code, makes it the duty of the personal representative to defend all doubtful or unjust demands against the estate, and in all such cases he is entitled to trial by a jury. When a judgment is obtained at law, and execution is returned "No property found," then a court of equity will take jurisdiction for the purpose of compelling the discovery of assets and compelling the proper distribution thereof. The ground of equitable jurisdiction is that personal representatives are trustees of their decedent's estates for the payment of debts and legacies. In the case of *Righter* v. *Riley*, 42 W. Va. 633, (26 S. E. 357), this Court held that equity would not interfere with a trustee in the proper discharge of the duties of his trust. So long, therefore, as a personal representative is faithfully discharging the duties of his trust and administering the same in accordance with law, and there is no deficiency of assets, there is no excuse for equitable interposition. Since the statute provides for the filing of inventories and the settlement of the accounts of personal representatives annually, the allegation of the want of knowledge of the condition of the estate and the necessity for discovery is not sufficient, unless it further shows neglect of duty on the part of the personal representative, in some way injurious to the creditor complaining. These statutory provisions were enacted for the protection of the estate, the creditors thereof, and others interested therein, and, if the personal representative files his inventories and makes his settlements in accordance therewith, no creditor has a right to complain, or seek equity for an account or discovery of assets; and to hold that any creditor might at any time, simply because he has a legal demand against the estate, sue in equity, instead of at law, for the enforcement thereof, would be destructive and ruinous to the estate, and permit the same to be devastated with unnecessary costs; for what one creditor could do, all could do. Each in turn could file his bill, and, on confession of assets, take a decree for the same. The common law would not permit this, nor does the statute law. *Bacheldor* v. *Elliott's Adm'r*, 1 Hen. & M. 10. Nor do any of the cases relied on by plaintiff refute this doctrine. They each hold that, in

the special case shown, equity had jurisdiction, and no more, and give some specific reason for assuming such jurisdiction. The case of *Beverly* v. *Rhodes*, 86 Va. 415, (10 S. E. 572), is cited as the only one in opposition to this doctrine. The first point in the syllabus of that case is as follows, to wit: "A single creditor at large may sue personal representative of deceased debtor in equity for account of assets, payment of his debts, and general relief." What is meant by the terms "at large" and "general relief," it is hard to understand. They may, however, be treated as surplusage. The first probably means "general," while the other requires no specific meaning. There is no question but that a single general creditor may sue in equity for account of assets, providing the personal representative has not settled his accounts in the manner provided by statute, or there exists any other good reason for such suit; but he cannot sue in equity merely to establish a legal demand, and make an account or discovery of assets a mere pretext for so doing. Pretexts cannot give equitable jurisdiction, where it does not exist in their absence. *Hume & Warwick Co.* v. *Condon*, 44 W. Va. 553, (30 S. E. 56); *Thompson* v. *Iron Co.*, 41 W. Va. 574, (23 S. E. 795); *Russell* v. *Dickeschield*, 24 W. Va. 70; *Grafton* v. *Reed*, 26 W. Va. 437. In this case neither the necessity for discovery nor account is shown to exist, by the allegations of the bill, but its sole object is the establishment of a claim purely legal in its nature. The demurrer to the bill should therefore have been sustained. The decree is reversed, the demurrer sustained, and the cause is remanded for further proceedings to be had therein in accordance with the principles of equity.

Reversed.

CHARLESTON.

LEWIS *et al.* v. BRAGG.

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Submitted January 24, 1900.—Decided March 31, 1900.

1. ATTACHMENT—*Affidavit—Fraudulent Disposition of Property.*

Where a party who is engaged in the mercantile business owns several lots of land, and executes his negotiable note, payable in thirty days, for three hundred and sixty dollars, to a party to whom he is indebted before said note falls due; sells all of his stock in trade to a third party, and executes two deeds of trust for a considerable amount upon his real estate, when he was in fact insolvent; makes conflicting statements as to the terms of said sale, saying to one that he owed his vendee four hundred dollars, to be credited on the purchase money, and the residue paid to him in fifty dollar monthly installments; to another that his vendee had paid him part cash, and the residue was to be paid in installments; while to another he said the purchase money was to be paid in fifty dollar monthly installments, not claiming that his vendees owed him anything; and, when asked to give his order on the vendees in payment of said note, declined, saying he would pay it in his own way and time,—these facts strongly indicate that said merchant had disposed of his property with intent to defraud his creditors, and, if set forth in an affidavit filed by the party to whom said note was made payable, are sufficient to authorize an order of attachment. (pp. 710-711).

2. ATTACHMENT—*Affidavit.*

While a supplemental affidavit for an order of attachment should be filed by the party who makes the original affidavit, such affidavit may be made by a third party, who is a credible person. (p. 711).

Error to Circuit Court, Fayette County.

Action by Lewis, Hubbard & Co. against W. H. Bragg. Judgment for defendant, and plaintiffs bring error.

Reversed.

PAYNE & HAMILTON, for plaintiffs in error.

C. W. DILLON, for defendant in error.

ENGLISH, JUDGE:

The firm of Lewis, Hubbard & Co., being about to institute a suit at law in the circuit court of Fayette County against W. H. Bragg, C. C. Lewis, Jr., one of said firm, filed his affidavit with the clerk of said court, for the purpose of obtaining an order of attachment against the estate of said Bragg, stating in said affidavit that the suit at law they were about to institute was for the recovery of a claim arising out of contract for the amount due on a negotiable note made by said Bragg to Lewis, Hubbard & Co., dated November 9, 1898, payable thirty days after date, for the sum of three hundred and sixteen dollars and sixty-three cents, and that he believed the plaintiffs were justly entitled to recover in said suit at least the amount in full of said note, to wit, three hundred and sixteen dollars and sixty-three cents, and that the following grounds existed for issuing an order of attachment in said suit: First, that defendant had assigned and disposed of his property, or a material part thereof, and was about to dispose of the residue thereof, with intent to defraud his creditors; second, that he was converting his property into money or securities with intent to defraud his creditors. And he stated the following as the material facts relied on by him to show the existence of the grounds upon which his application for said attachment was based: That the defendant, Bragg, had been until recently engaged in the saloon and general mercantile business in said county of Fayette; that he became indebted to sundry persons in considerable amounts, until his indebtedness exceeded the value of all his property, and that he became insolvent while carrying on said business; that during the month of November, 1898, he sold and disposed of all his stock in trade in his saloon and store near Coit, in said county of Fayette, to Ballard & Sanner; that said Bragg had stated to plaintiffs' agent that he owed said Ballard & Sanner the sum of about four hundred dollars, and that said sale was made partly in consideration of said four hundred dollar debt; that the balance was to be paid him in installments of fifty dollars per month; that no notes were taken in the transaction, and no cash received; that the said Bragg refused to give the plaintiffs any security for

their debt, and refused to have any portion of the amount he claims to be due from said Ballard & Sanner applied to the discharge of said plaintiffs' debt or the security therefor; that defendant stated to another person that Ballard & Sanner had paid him part cash, and the balance was to be paid in installments, and made no mention whatever of any indebtedness on his part to Ballard & Sanner; that said Bragg stated to another person that he had made said sale to Ballard & Sanner, and that they were to pay the purchase money in installments of fifty dollars monthly, and did not claim that he had been indebted to said Ballard & Sanner in any amount; that the said Bragg had recently made two deeds of trust, and acknowledged the same for record, by which he had conveyed all of his real estate in said county to secure Simms & Walker, a firm engaged in the wholesale beer business at Montgomery, in the sum of two hundred and sixty dollars; that at the time of making said deeds of trust the defendant was and still is insolvent; and that the object of said deeds of trust was to give Simms & Walker an unlawful and fraudulent preference over the plaintiff and other creditors of said defendant.

On the 24th of December, 1898, on this affidavit, the plaintiffs sued out of the clerk's office of said county an order of attachment against the estate of the defendant, and designated said Ballard & Sanner as persons indebted to, or having in their possession the effects of, the defendant, Bragg, and had the same levied on certain real estate as Bragg's property. Ballard & Sanner were summoned as garnishees. The defendant appeared, and moved to quash the affidavit of C. C. Lewis, Jr., and to dismiss the attachment issued thereon; which motion was sustained, and the plaintiffs excepted, moved and asked leave to file supplemental affidavits of A. W. Hamilton and J. T. Grose, and tendered the same, which were ordered to be filed. To this the defendant objected and excepted, and again moved the court to quash said original and supplemental affidavits; which motion was sustained, the affidavits quashed, and attachment dismissed. To this ruling of the court the plaintiffs again excepted, and applied for and obtained this writ of error, assigning as error the action of the court in quashing said affidavits and dismissing said attachments.

The application for an attachment in this case is based upon two grounds set forth in the affidavit of C. C. Lewis, Jr., given above. It is contended by counsel for the appellee that the material facts thus set forth are insufficient to show a fraudulent intent on the part of the defendant. It appears from this affidavit that on November 9, 1898, the defendant executed to plaintiffs a negotiable note for three hundred and sixteen dollars and sixty-three cents, payable thirty days after date; that he was then carrying on a saloon and general mercantile business in Fayette County; and that during said month of November he sold and disposed of all his stock in trade to Ballard & Sanner, and within the thirty days preceding the maturity of said note he executed two deeds of trust upon his real estate in said county to secure Simms & Walker the sum of two hundred and sixty dollars. Now, we must presume that the plaintiffs, in allowing the defendant thirty days' time on his indebtedness to them, were influenced by the fact that said defendant was the owner of real estate levied on under the attachment, with a stock of merchandise in his possession in said county; yet before the thirty days expire his entire stock in trade is sold to Ballard & Sanner. To one party he says he owed them four hundred dollars; and the balance of the purchase money was to be paid in installments of fifty dollars a month, and that he took no notes and received no cash; to another he stated that Ballard & Sanner had paid him part cash, and the residue would be paid in installments, and mentioned no indebtedness to said firm; while to yet another he claimed the said firm of Ballard & Sanner were to pay him in installments of fifty dollars, and was silent as to any indebtedness to said firm. Upon a motion to quash, the facts stated in the affidavit must be regarded as true, and from the facts stated let us inquire the motive which prompted this defendant to dispose of all of the property he owned in said county or anywhere else. As it appears, he was insolvent. He knew that on the 9th day of December, 1898, his note for three hundred and sixteen dollars and sixty-three cents to plaintiffs would fall due, and an effort would probably be made to enforce its collection against his property; and the fact that he disposed of all of his personal property, and executed deeds

of trust upon his real estate, before said note matured, and told different stories as to the consideration and manner of its payment, strongly indicates that the motive prompting this sudden riddance of his entire property and closing of business was to defraud the plaintiffs, and prevent the collection of said note. In the case of *Delaplain* v. *Armstrong*, 21 W. Va. 211, one of the material facts relied on was that the defendant neglected and refused to make any arrangement by which plaintiffs and other creditors would be secured, and the Court said: "It does not appear from this that either the plaintiff or any other creditors ever demanded any security for their debts, or that the defendants had the means or ability to give such security." Quite different in the case at bar. Here the affidavit avers that the said Bragg "refused to give the plaintiffs any security for their debt, and refused to have any portion of the amount he claimed to be due from Ballard & Sanner applied to the discharge of plaintiffs' debt, or the security therefor." Viewed in the light of these acts and declarations of Bragg, can we ascribe any other motive to him than that of defrauding the plaintiffs? Again, the motive for disposing of his property in the manner he did is apparent, from the concluding clause of the affidavit of A. W. Hamilton, where he states that Bragg declined and refused to give him an order on Ballard & Sanner to apply any part of the debt of plaintiffs, saying he would "pay in his own way and time;" by which he meant, as we must construe it, that he would pay when he got ready.

The defendant's counsel contends that the affidavits of Hamilton and J. T. Grose were improperly filed by the circuit court. In considering this point, we remark, first, that the strictness with which the attachment law has always been construed has been very materially relaxed by the present statute, which allows the plaintiff to file a supplemental affidavit; and this Court has held in *Goodman* v. *Henry*, 42 W. Va. 527, (26 S. E. 528), 35 L. R. A. 847, that "the provision in section 1, chapter 106, Code, allowing time to file supplemental affidavit of other material facts to show ground of attachment, is remedial, and should be liberally construed." This allows the plaintiff to file his own affidavit, or that of some credible person; but, on ob-

jection to the sufficiency of such facts, the affiant shall have the right to file a supplemental affidavit, stating any other facts which may have come to his knowledge since the filing of the original affidavit, and which are relied on to show the existence of such grounds. In *Miller* v. *Zeigler*, 44 W. Va. 485, (29 S. E. 981), it is held that a supplemental affidavit in an attachment need not state expressly that the additional facts came to his knowledge since the first affidavit, and, as the original affidavit may be made by some credible person, so we hold the supplemental affidavit may be made by a like person.

The material facts stated in the supplemental affidavits are that the defendant executed two deeds of trust on his real estate to secure a debt to Simms & Walker, who, after filing said deeds in the clerk's office of the county court for record, withdrew the same before they were recorded: which fact would materially detract from the *bona fides* of the transaction, as deeds of trust to secure *bona fide* debts are uniformly promptly recorded; also that the defendant, after disposing of all of his goods to Ballard & Sanner, and making conflicting statements as to the terms of said sale and consideration therefor, refused to apply any portion of the same to plaintiffs' debt by giving an order on his vendees, and having, as he supposed, in a mysterious manner disposed of all of his property, defiantly stated that he would pay them in his own way and time.

Counsel for the appellee claims that the supplemental affidavit filed by J. T. Grose, clerk, is bad, because the facts therein stated occurred after the filing of the original affidavit, and says the same objection applies to the affidavit of said Hamilton. But in this he is mistaken. The affidavit states that affiant has read the description contained in the levy made by the sheriff under said order of attachment, and that the property therein described is the same conveyed in said deeds of trust, but he does not say the levy was made before the deeds of trust were executed, nor does he say the deeds were withdrawn either before or after said levy.

As to the affidavit of A. W. Hamilton, while it is true it was made subsequent to the original affidavit, the material

facts therein stated occurred prior to the filing of the original affidavit.

Counsel for the appellee also relies on the cases of *Capehart's Ex'r* v. *Dowery*, 10 W. Va. 130, and *Sandheger* v. *Hosey*, 26 W. Va. 225; but the facts in those cases are very different from the one at bar, and can have, therefore, little weight in determining the questions raised here. In *Frank* v. *Zeigler*, 33 S. E. 761, this Court held that "a transfer of his property by a debtor is void as to his creditors, even though the grantee pay the full value, and though it is applied on *bona fide* debts of the grantor, if the intent of the grantor in making the transfer was to hinder, delay, or defraud other creditors, and the grantee had notice of the grantor's fraudulent intent."

Do the material facts relied on in the affidavits show the existence of the grounds relied on sufficiently to base an attachment thereon? It seems that the defendant's contract was to pay plaintiffs' debt in thirty days. Instead of making any arrangement to do this, he proceeds to dispose of all of his property before the note falls due, and feels himself so successful in getting rid of his property that he allows his intent in so doing to crop out in his defiant replies to Hamilton as to paying when and how he pleased. We can construe these acts and declarations of defendant in no other way than that the disposal of his property was effected for the purpose of avoiding his contract and delaying and defrauding the plaintiffs in the collection of their debt. My conclusion is that the circuit court erred in holding the affidavits insufficient and quashing the attachments. The judgment is reversed, and the cause remanded.

Reversed.

CHARLESTON.

STAUFFER v. KENNEDY *et al.*

Submitted January 29, 1900—Decided March 31, 1900.

1. FRAUDULENT CONVEYANCE—*Evidence.*
Where a conveyance or deed of trust is given by a debtor to one who is a near relative, and thereby the debtor largely disables himself from paying his debts, and such conveyance or deed of trust is attacked as fraudulent by creditors, the party claiming under it must fully and clearly establish a valuable consideration for it. (p. 711).

2 FRAUDLENT INTENT—*Evidence.*
Fraudulent intent in a conveyance may be shown by either direct or circumstantial evidence, and such circumstantial evidence, though only circumstantial, is sufficient if it lead a reasonable man to the conclusion that such fraudulent intent existed. *Burt* v. *Timmons*, (2 S E. 780,) 29 W. Va. 441. (p. 712).

Appeal from Circuit Court, Berkeley County.

Bill by John Stauffer against Phoebe Kennedy and others. Judgment for defendants, and plaintiff appeals.

Reversed.

D. C. WESTENHAVER and GEORGE W. JOHNSON, for appellant.

U. S. T. PITZER, for appellees.

BRANNON, JUDGE:

Prior to June 10, 1889, Robert Kennedy, with Samuel Kennedy as his surety, executed promissory notes to Israel Reiff for seven hundred dollars as purchase money for a saw-mill sold by Rieff to Robert Kennedy. On June 10, 1889, Samuel Kennedy made a deed of trust to secure to Phoebe Kennedy the sum of one thousand five hundred dollars upon a tract of land in Morgan County. On August 8, 1893, the administrator of said Reiff recovered a judgment against Robert and Samuel Kennedy upon the

said notes to Reiff for six hundred and twenty-two dollars and two cents and costs. The judgment of Reiff's administrator against the Kennedys came by assignment to John Stauffer, and in 1897 he brought this chancery suit in the circuit court of Berkeley County against Phoebe Kennedy and others to subject to the payment of said judgment a tract of land in Berkeley County, which had been sold under a deed of trust by Ingles, as trustee, and conveyed by him to Phoebe Kennedy, the bill charging that the land was paid for with the money of Samuel Kennedy, that it was really his land, that it had been conveyed to Phoebe Kennedy only to shelter it from the said judgment as a debt of Samuel Kennedy, and in fraud of said judgment. The court dismissed the bill, and Stauffer appealed. The tract of land in Morgan County, called the "Harper Land," belonged to Samuel Kennedy. He went security for his brother, Robert, on said notes. One of the notes became due, and Robert Kennedy was unable to pay all, but did pay some of it. This debt threatened Samuel Kennedy's little farm seriously, it being worth only one thousand five hundred dollars. It alarmed him. He was a bachelor in the 60's, living on the land in Morgan. His sister, a maiden lady, a few years his junior, lived with and kept house for him. She told him not to go security for Robert Kennedy, and seemed to be irritated that he had done so. In this state of things, when all knew that Robert Kennedy could not pay the debt, Samuel Kennedy sold and conveyed to John Stauffer the tract of land in Morgan County. When the deed was made, one thousand three hundred and twenty-two dollars of the purchase money was laid down on a table, when Stauffer, Phoebe Kennedy, and Samuel Kennedy, Jr., were all present; Samuel Kennedy, Sr., being at the house, but not being present in the room just at the time the money was laid upon the table. Morgart (who was also present, and who really furnished the money for Stauffer, as he had purchased the land from Stauffer after its sale to Stauffer by Kennedy) asked to whom the money should be paid, and Phoebe Kennedy said, "Pay it to little Sam," meaning Samuel Kennedy, Jr. He took the money, and handed it to Phoebe Kennedy. Some one suggested the prudence of putting the money in bank, and Phoebe

Kennedy then or shortly after committed one thousnd two hundred and seventy dollars of the money to the hands of her nephew, Samuel Kennedy, Jr., to take it and deposit it in bank, and on the next day he deposited it in bank, not to the credit of Phoebe Kennedy, but to the credit of Samuel Kennedy, his uncle. When he returned home he at once informed his aunt of this deposit, and the defense claims that she was dissatisfied with it, but it continued on such deposit from December 4th to December 16th, when Samuel Kennedy drew a check in favor of Samuel Kennedy, Jr., for the one thousand two hundred and seventy dollars, and the latter drew the money from bank, and paid it to Phœbe Kennedy, as he and she say. This check was dated the 16th of December, 1895. On January 14, 1896, the said sale was made by said trustee, Ingles, of the tract of land in Berkeley County known as the "Weller Land," and it was knocked down under a bid of five hundred and fourteen dollars and fifty cents made by Samuel Kennedy, Jr., who paid the cash, and directed the deed for the land to be made by the trustee to Phœbe Kennedy, and it was so made. It is this land which Stauffer claims is the land really of Samuel Kennedy, bought with his means, and only put in the name of Phœbe Kennedy to evade the said debt. I think there is no escape from this conclusion. Nobody questions, but everey body connected with the case admits, that the purchase money used in paying for this land is the very same money which came from the sale of Samuel Kennedy's Morgan County land. But Phœbe Kennedy rests her defense—must rest it—solely on her right under the said deed of trust on the Morgan land. She says that her deed of trust, though not prior to the date of the notes on which Stauffer's judgment is based, is yet prior as a lien to that judgment, as it is, if valid. The whole case turns on the *bona fides* of that deed of trust. Is it a valid debt equal in merit to that of Stauffer? Or is it one trumped up on no solid basis, simply to defeat an honest debt of her brother? In 1875, Samuel Kennedy, who had been living in the West, returned to Morgan County, and went upon the farm of an aged brother-in-law,—Harper,—under a contract to support Harper and his wife in consideration that Harper

should convey the land to Kennedy. Kennedy did support Harper and his wife until their death, and thus derived the said Morgan County land, which he sold to Stauffer, as above stated. Phœbe Kennedy was poor, working about the country. When her brother went to take charge of this farm, she went upon the farm with him. There she made her home with her brother and with her sister, the wife of Harper; all in one family. She did housework unquestionably. Any sister would do that. Samuel Kennedy labored industriously upon the farm. He was a sober, industrious man. He was dead when this suit was brought. Phœbe Kennedy swears that when she went to live with her brother it was under the agreement that she was to have for her services in waiting upon the old people, Harper and wife, and doing general housework, two dollars and fifty cents per week, to be paid by Samuel Kennedy, besides her board, and the right to the marketing stuff on the place. This large reward is not very plausible. She needed a home, and it is more probable that she intended to charge nothing to her brother, but labored simply as one of the family, from love and affection, and not for money. Our common experience tells us this. That is natural and usual with plain country people in their condition of life. Under well-settled principles of law, this sister, far up in life, would be presumed to labor for her close blood kin and herself as well—for her home—without expectation of reward, without contract for reward, and against an honest debt of her brother she must indubitably establish, not merely that she did household service, but did it under express contract for pay. Besides, a neice, Johanna Downey, lived with them for fifteen years, and did much of the work, rendering it highly improbable that, in addition, Samuel Kennedy was under contract to pay Phœbe Kennedy the large wages claimed by her. Phœbe Kennedy is the strongest witness to sustain this alleged contract for the payment of her wages, but, of course, she is a party to this suit, and cannot give evidence in her own behalf of a personal transaction with her dead brother to charge him with a debt to the prejudice of his creditors. *Smith* v. *Turley*, 32 W. Va. 14, (9 S. E. 46). What other witnesses sustain this contract? Samuel Ken-

nedy, Jr., Robert Kennedy, and Johanna Downey, all very closely related, and moved by the strong motives of human nature to try to save the home for Phœbe Kennedy; and they only depose to declarations made by Samuel Kennedy not to the making of an explicit contract for such wages. We must remember that these transactions, deed of trust, and evidence are between close relatives, and the deed of trust was made under the alarm and distress overshadowing Samuel Kennedy and the only home which his aged sister had, caused by that unfortunate suretyship for his brother. Our cases on fraudulent conveyances are very rigorous on those claiming under them. This claim was an old debt running back fifteen years before the deed of trust. *Knight* v. *Capito*, 23 W. Va. 639, says that, if a conveyance be made by father to son in consideration of old debts, and it is impeached by creditors as fraudulent, the son will be held to stricter proof of honesty than would a stranger. Many cases say that when a conveyance or deed of trust between close relatives is assailed by creditors as fraudulent, such relationship is a badge of fraud, and calls upon those claiming under it for full proof of all the essentials to sustain such conveyance, and throws upon them the burden of proof. *Burt* v. *Timmons*, 29 W. Va. 441, (2 S. E. 780); *Reynolds' Adm'rs* v. *Gawthrop's Heirs*, 37 W. Va. 3, (16 S. E. 364).

One circumstance against that deed of trust is that it bears date June 10, 1889, and was not acknowledged until September, 1890, recorded September 17, 1890. Why this delay, if it was a valid deed? This is a circumstance against its validity, a strong mark of fraud, when debts threaten. *Reynolds' Adm'rs* v. *Gawthrop's Heirs*, 37 W. Va. 8, (16 S. E. 364); Wait. Fraud. Conv. section 230. Why this delay? I ask again. The parties were uneasy, or, rather, Samuel Kennedy was, on account of this debt, and hardly knew what to do; was hesitating whether to put the deed on record or not; was in doubt. This is shown by the fact that he went alone to Girault, and had him to draw the deed of trust, and never delivered it to Phœbe Kennedy, as she admits, until after its recordation, and took it himself to the clerk's office and had it recorded, paying the fee. Phœbe Kennedy did not participate in all

this, was not present when the deed was made or recorded, says she did not see it until after it was recorded, though she says her brother told her that he had made it. Rather unusual conduct. The matter rested until 1894, when the sheriff went to levy an execution for this debt on Samuel Kennedy's property, and then she set up a claim to all the personal property on the farm. She thus became, instead of the servant of her brother, the owner of every tittle of property he had on earth. He was a complete bankrupt in her favor. How did she claim the personalty? The fact that she did so, making her brother utterly insolvent, tends to show strongly that her brother had made her the safety deposit of all his property. Turning to the deed of trust, we find that it conveys not only the land, but also personal property, though it does not describe the personal property. Thus this deed of trust conveyed to her all he had, as the debt was probably fully equal to realty and personalty in value. Though not involved in this case, yet it is a circumstance tending to show that the sister was the safety deposit indicated above; that in October, 1878, Samuel Kennedy made a deed to her for three wagons, wheat fan, plows, harrow, three horses, fifteen hogs, and all notes, bonds, and credits of every kind. What stress induced this unrecorded bill of sale does not appear, but it is not without force in shedding light on the deed of trust in question. When a conveyance in favor of a relative leaves a man without means to satisfy his creditors, it is the basis of a strong suspicion of fraud; it is *prima facie* fraudulent, and calls upon the grantee to furnish strong proof of *bona fides* of the transaction. If a conveynce provides for near relatives at the expense of creditors, the relatives must assume the burden of proof, and make things clear. *Reynolds' Adm'rs* v. *Gawthrop's Heirs*, 37 W. Va. 3, (16 S. E. 364); *Burt* v. *Timmons*, 29 W. Va. 441, (2 S. E. 780); *Herzog* v. *Weiler*, 24 W. Va. 199. Now let us turn to the features or circumstances of the debt claimed by Phœbe Kennedy. It ran on from 1875 to 1889. Much of it was barred. If notes had been given, it would tend to show that there was such a contract for wages. The fact that a large part of the debt was barred is a circumstance against the honesty of the

debt; not conclusive, but a circumstance. *Knight* v. *Capito*, 23 W. Va. 639; *Bank* v. *Atkinson*, 32 W. Va. 203, (9 S. E. 175). Phœbe Kennedy herself says that she never received a cent for her work until she received the purchase money from the Morgan County land in December, 1895, in payment of her deed of trust. Why did she labor so long without pay, if she had a contract for pay? Add to these things the fact that the money which Phœbe Kennedy received from the sale of the Morgan County land was deposited in bank by her nephew, Samuel Kennedy, Jr., not to her credit, as it should have been, if her money, but to the credit of Samuel Kennedy, Sr., as it should have been, if his money. This deposit has strong import in this case. Young Samuel Kennedy was then twenty-four years of age, quite sprightly and intelligent, as is shown by his examination, and particularly by his altercation with an attorney on cross-examination. He lived very near his uncle Samuel, was, more than anybody else, acquainted with the affairs of his uncle and aunt, attended to their business, and, as the whole cast of this case shows, knew the true status of things concerning the matters involved. He knew that this deed of trust was only a sham to protect the land from this debt. Things cannot always be directly proven, yet the circumstances inferentially and logically may leave no doubt of them. Young Samuel Kennedy was present when the money was paid,and heard his aunt answer that it was hers, and he received the money for her, and went through the form of handing it to her, and afterwards, notwithstanding all this,—a few hours afterwards,—he received this money back from his aunt, and deposited it in bank to his uncle's credit. Why? Because he knew that it was his uncle's money. He and Phœbe Kennedy say that he was given no directions as to the deposit. Why not, if it was her money? "*Res ipsa loquitur.*"

Looking to the circumstances of this alleged debt from Samuel to Phœbe Kennedy, it ran on fourteen years. She received nothing. Did they settle? Did he give notes to show indebtedness? Phœbe Kennedy says they made four settlements, and that Samuel gave her notes for amounts found due; but, when asked to produce them, she

said that the mice had eaten them up; yet the mice had not eaten the deed of trust up. She states that she kept a book containing the account between her and her brother. She was asked to produce it, but did not, saying she did not know where it was. Thus no memorandum of settlement or note in these many years comes forth to show that, as the years went along, these parties treated each other as debtor and creditor. The deed of trust refers not to these alleged notes, as it would be supposed to do, if they existed. They would be mentioned, so that each one would call for its interest. The trust is only for a lump sum of one thousand, five hundred dollars, "as evinced on this deed of trust as executed by the said Samuel Kennedy to the said Phœbe Ann Kennedy, made payable on the issuance of this deed of trust." Therefore there were no notes. This trust is the first memorandum of debt, and it was born in the presence of danger from this unfortunate suretyship, and Phœbe Kennedy says explicitly that a fourth note for three hundred dollars was made four years after the trust, and it is required to make up the one thousand, five hundred dollars. A strange circumstance. Where is that note? No such book of account was kept as Phœbe Kennedy says. She does not produce it. Neither she nor her brother Samuel could write. But she says that a brother, Hugh Kennedy, kept that book. He is dead. Johanna Downey, the niece, a member of the family for fifteen years, says that her aunt showed her the deed of trust, but said that she was never shown any notes, and never saw any account book; that her aunt kept no account book, and that she never saw Hugh Kennedy do any writing for his brother and sister. Robert Kennedy says that his sister showed him the deed of trust, but never showed any notes. Strange that she would not show the notes also, if they existed, unless they had been eaten up by mice.. And just here I note what seems to me to be important in the evidence of Robert Kennedy. He says that in 1894 his sister gave him this deed of trust to show it to a lawyer to see if it was good. Kennedy was asked whether the reason for consulting a lawyer about the trust deed was not because Samuel Kennedy was a security for Robert in the sawmill

debt, and answered: "Well, I don't know whether I can make any such statement or not. It has been a good while ago." Phœbe Kennedy was poor. She had once made her home mostly with her sister, Mrs. Harper, and worked about the country. Evidence shows that she had no personal property; that until the year 1894 she was assessed with none, but that she was assessed with one hundred and forty-three dollars that year, fifty dollars in 1895, and nothing in 1896. She had no land until the Weller tract was put on the land book in 1896. It is to be noted that it was in that year, 1894, when the sheriff went with the execution to levy on property of Samuel, that Phœbe set up a claim to all the personalty, and it was put on the tax books to her for the first time that year. She says that she had four hundred dollars in money. Nobody ever saw it. She says she lent it to Samuel. She is not competent to prove this. If she lent it, that loan and her wages would make much more than one thousand five hundred dollars secured by the trust. Is it likely that she remitted anything to her brother?

I have above stated the case substantially without reference to the evidence adduced by the plaintiff, on the case as made by the defendant; and, considering the principle of law well settled in this State, that where a debtor conveys to a near relative valuable property, disabling himself from paying his just debts, and the transfer is assailed by creditors, the party claiming under that transfer must show clearly the consideration, the fair, honest consideration, I may say fairly that Phœbe Kennedy fails to meet this requirement, and her case fails. There are too many circumstances of suspicion. Remember that our decisions, in a case like this, where the transaction is between close relatives, and where the evidence to sustain it comes entirely from close relatives, look askance upon the transaction and its supporting evidence. The party claiming under that transaction carries the burden of proof, but, even if the burden were on the shoulders of the plaintiff, we must not carry the rule that fraud is never presumed, but must be fully proved, too far. We must not require evidence of fraud beyond reasonable doubt. If we do this, fraudulent conveyances and covinous transactions will walk

triumphant over the just right of others; a premium will be given to fraud. The distinguished and lamented JUDGE GREEN, in *Burt* v. *Timmons*, 29 W. Va. 460, (2 S. E. 791), said, in enunciating the true principle: "I suppose that the real trouble in reaching correct decisions in these cases is that the rules of law which have been laid down have been misapprehended, though this Court has endeavored to make them clear. Yet some seem still to think and act as though to establish fraud in cases like the one before us required evidence almost as strong as the evidence required to convict in a criminal prosecution; and when fraud is established by direct proof or necessary inference, they seem to think that the slightest evidence ought to be regarded as sufficient to explain and rebut the facts which establish the fraud. It is hoped that these erroneous views will be abandoned; for, if they prevail, our married woman's act and acts permitting interested witnesses and parties to testify, and husbands and wives to testify for each other will be utterly perverted from the purpose for which these acts were passed, and they will become the fruitful source of fraud and perjury. These acts were not designed, and the courts should not permit dishonest debtors to use them, to defraud their honest creditors, and to retain their property for their own use by withdrawing it from their creditors by fraudulent investments of it in the name of their wives. This practice is becoming too common, and should be strongly discountenanced by the courts. It cannot be effectually checked, so long as the false views necessary to establish fraud in such cases, and to rebut it, when *prima facie* established, are abandoned." The State owes a large debt of gratitude to JUDGE GREEN, not only for the great and laborious research and the notable ability characterizing his luminous opinions when the law of this State was in a formative condition, which opinions stand as guiding precedents, but also for the high morality and business honor spoken in those opinions. The same principles as quoted above touching the amount of proof to sustain the charge of fraud are contained in numerous decisions of this Court. *Goshorn's Ex'r* v. *Snodgrass*, 17 W. Va. 717. In *Reynolds' Admr's* v. *Gawthrop's Heirs*, 37 W. Va. 3, (16 S. E. 364), the syllabus

says: "While the burden of proving a deed fraudulent in fact as to credtiors is upon them, positive evidence of fraudulent intent is not required, but it may be deduced from the circumstances of the transaction, and the relation and situation of the parties to it and to each other. Circumstantial evidence, if adequate to satisfy the court of such fraudulent intent, is sufficient, and often the only evidence obtainable."

I now turn to the evidence adduced by the plaintiff to support his cause. It makes the *prima facie* case left by the defendant's evidence conclusive. Bassore says that he was present at the sale of the Weller land, and that Samuel E. Kennedy, called above Samuel Kennedy, Jr., told him that he was buying the land for his uncle Sammy Kennedy. Bassore is disinterested. Shriver, who is also disinterested, lived a near neighbor to Phœbe and Samuel Kennedy, in Morgan County, for many years, and was well acquainted with them and their business. He says that Phœbe never owned any property. He says that both Samuel Kennedy and Phœbe Kennedy told him that their nephew had bought the Weller land at the trustee's sale for Samuel Kennedy. Shriver worked on the Weller farm for Samuel Kennedy in making permanent repairs, and was paid by Samuel for it. He also says that after the sale of the Morgan land he heard that Phœbe Kennedy had some money, and he asked her for a loan, and she replied that she had no money to loan. There is some question whether she said she had no money, or no money to loan; but it is evidence either way. In fact, she admits this conversation, and says that she told him that she had no money, but says it was before she received that money, whereas he says it was afterwards. Stauffer, the plaintiff, gives important evidence. He says that when he informed Samuel and Phœbe Kennedy that he was ready to pay the balance of the purchase money, they seemed uneasy about something, and that he thought then of the Reiff judgment, and it occurred to him that they feared that it was a lien on the land and that he would retain its amount out of the purchase money to meet it, and that he then stated to them that an attorney who had examined the title said that there was nothing against the land but Phœbe Kennedy's deed

of trust, and that he (Stauffer) thought that, as the Reiff estate had been settled up, as he had heard, there would likely be no trouble about that judgment, and that then they grew easy, and stated to him that the deed of trust to Phœbe Kennedy was given to save Samuel from the Reiff debt, and blamed Robert Kennedy for getting Samuel into the trouble, and that there was no obligation from Samuel to Phœbe Kennedy. Now, if this evidence were inadmissible because of Samuel's death, yet it is admissible against Phœbe Kennedy as to her own declarations, and also as to those of Samuel Kennedy, if we were to read her deposition in her behalf. Her deposition, though not admissible in her behalf, would be admissible as admissions against herself. The natural feelings of sympathy for Phœbe Kennedy have inclined me from the first to sustain her in this case, but law, under the facts, calls in another way; very plainly calls, as I see the case, to vindicate the rights of an honest creditor against a colorable transaction, a ficticious debt, trumped up in the hour of distress to defeat a creditor. We must, therefore, reverse the decree, and hold that the cause is for the plaintiff, and remand the cause to the circuit court, with directions to it to enter a decree for the debt of the plaintiff, and subjecting the land to its payment.

Reversed.

CHARLESTON.

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GLEN JEAN, LOWER LOUP & D. R. CO. *v.* KANAWHA, GLEN JEAN & E. R. CO.

Submitted January 25, 1900—Decided April 7, 1900.

1. COMMON LAW—*Damages—Injunction.*

At common law, damages occasioned by the suing out of

an injunction were not recoverable, unless the suit was without probable cause. or prosecuted through malice, (p. 720).

2. STATUTORY BOND—*Common Law.*
The statutory bond is intended to supply this defect in the common law. (p. 720).

3. INJUNCTION—*Damages—Probable Cause.*
Where no bond has been required, damages are not recoverable, unless the injunction was maliciously sued out, without probable cause. (p. 720).

4. REAL ESTATE—*Trespass—Description.*
In an action of trespass to real estate, unless the object of the suit is to try the title to the land, it is not necessary to describe it with accuracy and particularity, but only to designate it by possession name, or by some of its abuttals or monuments, sufficiently to give the defendant notice of its locality, so that he may properly plead to the action. (p. 723).

Error to Circuit Court, Fayette County.

Action by the Glen Jean, Lower Loup and Deepwater Railroad Company against the Kanawha, Glen Jean and Eastern Railroad Company. From a judgment dismissing the action, plaintiff brings error.

Reversed in part.

J. W. DAVIS and A. D. PRESTON, for plaintiff in error.

BROWN, JACKSON & KNIGHT, for defendant in error.

DENT, JUDGE:

The Glen Jean, Lower Loup and Deepwater Railroad Company filed its declaration in trespass on the case in the circuit court of Fayette County against the Kanawha, Glen Jean and Eastern Railroad Company, which demurred thereto. The demurrer was sustained, and, plaintiff refusing to amend, the suit was dismissed, and this writ of error followed.

The declaration contains five counts. The first, second, and fifth are for damages sustained by reason of the suing out of an injunction which was afterwards dissolved. They fail to charge that the injunction was sued out maliciously or without probable cause. This is a fatal defect. The authorities relied on by plaintiff's counsel are all against him. They are unanimous in holding that no ac-

tion lies at common law if the injunction was sued out on probable cause and without malice; and the case of *Gorton* v. *Brown*, 27 Ill. 489, holds that, if a bond is given, no action will lie, even where there is lack of probable cause, and malice exists, but the action must be on the bond. If no bond is given, it is intimated that the action might lie, if there is want of probable cause, or malice exists. In 7 Lawson, Rights, Rem. & Prac. 5791, it is said that a "defendant in an injunction suit has a common-law right of action to recover damages, in addition to the remedy by action on the bond." But this is where the injunction is obtained and used maliciously, without probable cause. The cases cited to sustain the text show this to be the true meaning of the language quoted. In the case of *Mitchell* v. *Railroad Co.*, 75 Ga. 398, it is held that an action does not lie at common law unless the injunction is sued out maliciously and without probable cause. So with the cases of *Manlove* v. *Vick*, 55 Miss. 567; *Iron Mountain Bank* v. *Mercantile Bank*, 4 Mo. App. 505; *Hayden* v. *Keith*, 32 Minn. 277, (20 N. W. 195). These cases all sustain the text found in High, Inj. § 1648, and 10 Enc. Pl. & Prac. 1119, and there are none to the contrary. The very purpose of the legislature in requiring an injunction bond to cover actual damages sustained was to supply this defect in the common law, and was not declarative thereof. The defendant to a dissolved injunction has two remedies,—one (statutory) on the injunction bond; the other (common law) for the malicious use of judicial process, without probable cause. Where no bond is given, the latter remedy alone exists. It becomes the defendant to an injunction suit to see that a good and sufficient bond is given, and unless he does so, he can recover no damages, in the presence of probable cause, and in the absence of malice. The defect in the bond complained of, if a defect,—for this is a matter not to be determined in this suit,—could have been easily remedied, had counsel been attentive to the interest of his client. For this inattention it must look to the neglectful counsel, and not to the court or the present defendant. In the case of *Tavenner* v. *Morehead*, 41 W. Va. 116, (23 S. E. 673), a similar right of action was considered by this Court, and the following statement of the law was

quoted with approval (page 123, 41 W. Va., and page 676, 23 S. E.): "This rule of public policy, as has been well said, 'is applicable alike to civil and criminal remedies and proceeding, that parties may be induced freely to resort to the courts and judicial officers for the enforcement of their rights and the remedy of their grievances, without the risk of undue punishment for their own ignorance of the law, or for errors of courts and judicial officers. The remedy of the party unjustly arrested or imprisoned is by the recovery of costs which may be awarded to him, or the redress which some statute may give him, or by an action for malicious prosecution in case the prosecution has been from unworthy motives and without probable cause.' *Teal* v. *Fissel* (C. C.) 28 Fed. 351." This law applies with equal force in this case. The remedy of the party unjustly enjoined is the recovery of costs in the first instance, damages on the statutory bond, if one be given, or an action of trespass on the case for malicious prosecution of the injunction suit. The gist of the latter action is the want of probable cause, and the maliciousness of the defendant's conduct. *Vinal* v. *Core*, 18 W. Va. 1; *Hale* v. *Boylen*, 22 W. Va. 234; *Brady* v. *Stiltner*, 40 W. Va. 289, (21 S. E. 729).

The fourth count does not even charge a legal trespass. It avers that the plaintiff had a right of way (describing it), and proceeds: "And plaintiff having said right of way and being possessed thereof, and then and there having the same graded by sundry laborers, and being so possessed thereof, the defendant, for the purpose of injuring the plaintiff, and harrassing it, took possession of said land and right of way, and forbade the said laborers to work on and grade the same, and held possession thereof from the 28th day of April, 1897, until the 22d day of April, 1898." There is no allegation that the defendant entered and took possession either wrongfully or unlawfully. The defendant's entry may have therefore been both rightful and lawful, although the plaintiff may have been harrassed and injured thereby. A tenant at will, it matters not that he is in possession of the tenement lawfully, may be dispossessed by his landlord entering and taking possession; and although such tenant may consider himself harrassed and

injured thereby, and although the landlord may enter for such purpose, still he has the lawful right to do so. It is an injury and harrassment resulting from the tenancy, of which the tenant has no right to complain. This count is therefore bad, for defectively stating what might be a good cause of action if properly stated.

The third count is as follows, to wit: "(3) And whereas the said plaintiff before and at the time of committing the grievances hereinafter enumerated had been and was lawfully possessed of a certain tract of land, containing nine acres, situated and being in the county of Fayette, and between the Loup Creek Branch of the Chesapeake and Ohio Railway and the property line of the real estate of N. M. Jenkins and T. C. McKell, and on Upper Loup Creek and Whiteoak Branch, in the county aforesaid, and by reason thereof the plaintiff had the right to the possession and use thereof, and to occupy and work on said land, but the said defendant, well knowing the premises, but wrongfully and unjustly intending to injure the plaintiff in that behalf, and deprive it of the use and benefit of said land, whilst the plaintiff was so possessed of said land, to wit, on the 28th day of April, 1897, and on divers other days and times between that day and the 22d day of April, 1898, at the county aforesaid, wrongfully and injuriously seized upon and took possession of said land, and forcibly ejected the plaintiff from said land, and prevented it from working on said land as of right it might have done, and held and kept possession of said land from the said 28th of April, 1897, until the 22d day of April, 1898, and plaintiff was deprived of the use of said land for the period aforesaid, at the county aforesaid, and it was thereby injured and damaged in the sum of twenty thousand dollars." There is only one objection made to this count, and that is an insufficient description of the place of the trespass. In all other respects the count appears sufficient, as it charges the trespass to have been wrongful, which is equivalent to unlawful. The defendant's counsel rely on the case of *McDodrill* v. *Lumber Co.*, 40 W. Va. 564, (21 S. E. 878), to sustain their contention as to the sufficiency of the *locus in quo*. In that case it was held that "the place where the acts complained of were done is material and traversable, and the allegations there-

of must in some way—either by the name of the land or close, by some or all of its abuttals, by naming a particular locality, or in some other way—designate or describe such *locus in quo* with a reasonable degree of definiteness." On page 568, 40 W.. Va., and page 879, 21 S. E., JUDGE HOLT says: "It is not called the close of any one, or designated as in the occupation of any one, or given any name or description, nor metes or bounds of any kind, in whole or in part. Any one or all of these modes of designation would have sufficed." At common law, it was not necessary to describe the land, unless the defendant's plea required a new assignment. 26 Am. & Eng. Enc. Law, 628. And now it is only necessary to designate it by name or by some of the abuttals, or by some other sufficient description to identify the place of the trespass. The same accuracy of description is not required as in ejectment or unlawful detainer, unless the action is brought to try title; for the recovery of the possession is not sought, and, though the land be generally described, proof of trespass on any part thereof is sufficient. *Hall* v. *Mayo*, 97 Mass. 416. This count describes the land as containing nine acres, and in the lawful possession of the plaintiff (meaning from what follows, actual possession), "situated and being in the county of Fayette and between the Loup Creek Branch of the Chesapeake and Ohio Railway and the property line of the real estate of N. M. Jenkins and T. G McKell, and on Upper Loup Creek and White Oak Branch" This shows the quantity of the land, in whose actual possession it was, and also some of the abuttals, and the waters on which located. Hence, it comes clearly within the requirements of the *McDodrill* v. *Pardee* case. But it is not the mere trespass on the land or portion thereof that is sued for, but it is for the wrongful and forcible ejection of plaintiff from the land, and the keeping it out of possession from the 28th of April, 1897, until the 22d of April, 1898,—the deprivation of the use of the property by the forcible trespass and holding of the defendant. What damages the plaintiff is entitled to recover, it is not necessary now to determine. To unlawfully enter on the land of another, and forcibly oust the owner, and keep him out for a long period of time, would certainly entitle him to some compensation, to be

given in the shape of damages, be it little or much. If, however, he wants special or consequential damages, his allegations must be made with this end in view; otherwise, he can receive nothing but actual damages. He might possibly recover the mesne profits, as they are recoverable in an action of trespass. These are questions for the circuit court in the first instance. This third count being good, and the other four bad, the judgment is affirmed as to the latter and reversed as to the former, and the case is remanded to the circuit court for issue and trial on such good count.

Reversed in part.

CHARLESTON.

STATE v. BURNETT *et al.*

Submitted January 24, 1900—Decided April 7, 1900.

1. SPECIAL JUDGE—*Oath.*

A special judge selected as required by law to try a felony case in a criminal court, in any case at the trial of which the judge of the court cannot properly preside, must, before proceeding to exercise the authority or discharge the duties thereof, take the oath prescribed by section 5 of article IV of the Constitution, as well as that provided for in chapter 20 of the Acts of 1895. (p. 727).

2. EVIDENCE—*Dying Declarations—Homicide.*

Dying declarations, being a substitute for sworn testimony, must be such narrative statements as would be admissible had the dying person been sworn as a witness. If they relate to facts to which the declarant could have thus testified, they are admissible. Mere declarations of opinion, which would not be received if the declarant were a witness, are inadmissible.

Quaere: As to whether counsel for the prisoner in a murder case can agree with the prosecuting attorney upon a

member of the bar as special judge, under chapter 20 of the Acts of 1895, to try, hear and determine such case (pp. 731-732).

Error to Circuit Court, Fayette County.

Mose Burnett and others were indicted for murder. Mose Burnett and C. C. Burnett, on conviction, bring error.

Reversed.

ADAM B. LITTLEPAGE and W. R. BENNETT, for plaintiffs in error.

ATTY. GEN. EDGAR P. RUCKER, for the State.

ENGLISH, JUDGE:

On the 11th day of July, 1898, John Hill, Carrie Hill, Margie Burnett, Mose Burnett, and C. C. Burnett were jointly indicted in the criminal court of Fayette County; the indictment charging that on June 27, 1898, in the said county, they did unlawfully and feloniously combine and conspire together for the purpose of murdering one Joseph Morris, and, in pursuance of said combination and conspiracy, on the day and year and in the county aforesaid, feloniously, wilfully, maliciously, deliberately, and unlawfully did slay, kill, and murder him, the said Joseph Morris, against the peace and dignity of the State. On the 20th of January, 1899, the following order was entered in this case: "It appearing that the Honorable J. H. Dunbar, the regular judge of this court, was interested as an attorney in this case before his election as judge, and therefore disqualified to sit as judge in this trial, and the counsel for the prisoners and the state having agreed upon the Honorable C. R. Summerfield, a member of the bar of this court and a practicing attorney of this State, to try, hear and determine this cause, thereupon the said C. R. Summerfield took the oath as prescribed by chapter 20 of the Acts of the Legislature of 1895." And the same day the defendants, John Hill and Carrie Hill, elected to be tried separately from the other defendants, and the prisoners Margie Burnett, Mose Burnett, and C. C. Burnett were led to the bar of the court, in custody of the sheriff, and demurred to the indictment against them, and moved the court to

quash the same, which demurrer and motion the court overruled. The prisoners objected and excepted, and pleaded, "Not guilty." and issue was joined thereon. The case was submitted to a jury, and resulted in a verdict finding C. C. Burnett not guilty of murder in the first degree, but guilty of murder in the second degree; the prisoner Mose Burnett not guilty of murder, but guilty of voluntary manslaughter; and the prisoner Margie Burnett not guilty. This verdict the prisoners, C. C. Burnett and Mose Burnett, moved the court to set aside because it was not according to the law and the evidence in the case, and supported said motion by affidavits, which motion was overruled, and the prisoners objected and excepted, and also moved in arrest of judgment, which motion was overruled, and the prisoners again excepted, and tendered their bill of exceptions to the various rulings and opinions of the court made and rendered in said case during the trial and after the verdict rendered, and prayed that the same be signed, sealed, and saved to them, which was accordingly done; and judgment was rendered upon said verdict, ordering that said C. C. Burnett be confined in the penitentiary for the period of fifteen years, and that Mose Burnett be confined in the penitentiary for the period of five years. From this judgment said C. C. Burnett and Mose Burnett obtained this writ of error.

In considering this case, the first question which presents itself is whether the plaintiffs in error were tried before a court of competent jurisdiction, properly constituted and empowered to pass upon the grave and important questions arising therein, involving the life and liberty of the prisoners. Was the special judge who presided at the trial properly selected? It is true that section 15 of chapter 86, of the Acts of 1891, establishing a court of limited jurisdiction in Fayette County, provides that when the judge is, from sickness or other cause, incapable of acting, or is absent, a special judge may be elected in the same manner as a judge of the circuit court. Also chapter 20, page 38, of the Acts of 1895, provides that, when the judge of the criminal court cannot properly preside at the trial of any cause therein, "the attorneys present and practicing in said court may elect a judge by ballot to hold said

court during the absence of the judge or for the trial of the cause in which the judge of said court cannot preside. The clerk of the court shall hold said election, declare the result thereof, and enter the same of record: provided, however, that the parties or their attorneys in any case in which the judge of the court cannot properly preside at the trial thereof may agree upon a judge to try or hear and determine the same, which agreement shall be entered of record in the proper order book of the court, and in such case no election of judge to try or hear and determine the case shall be held." In the case at bar it seems that the counsel for the prisoners and State agreed upon the Honorable C. R. Summerfield, a member of the bar of that court, and a practicing attorney of this State, to try hear, and determine this case, and thereupon he took the oath as prescribed by chapter 20 of the Acts of 1895. Now, it does not appear from the record that C. R. Summerfield, member of the bar and practicing attorney, was agreed upon as special judge to try, hear, and determine the case, and, so far as it appears, he may have been selected as an arbitrator. To constitute a court there must be a judge selected in the manner prescribed by law. The judge must be appointed and qualified in due form of law. 1 Bish. Cr. Proc. § 314. Here a member of the bar was agreed upon by counsel in a murder case to try, hear, and determine the case, without stating in what capacity. It is true, it appears that he took the oath that he would faithfully and impartially perform the duties of a judge of said court so long as he should continue to act as such; but his election must precede his qualification as judge, and merely taking the oath as judge would add nothing to his right to hold or exercise the duties of the office.

Let us next inquire whether, in the case of a party charged with murder, his counsel can agree with the prosecuting attorney upon a special judge to try and determine the case. Bish. Cr. Proc. § 893, speaking of trial by court with consent, says: "One form of waiver is, where authorized by statute, and the Constitution not withholding any needful jurisdiction from the tribunal, the defendant consents to be tried by the court without a jury he cannot afterwards complain. Such waiver must be personal.

The defendant's attorney, not specially empowered, cannot make it." In the criminal case of *Brown* v. *State*, 16 Ind. 496, the attorney of the defendant waived a trial by a jury of twelve men, and consented to a trial by a less number than twelve, as a jury. The defendant, though present in court, was not consulted, and did not know that he could object to the act of the attorney. It was held that such a waiver, at all events, was not binding on the defendant. In *State* v. *Miller*, 6 W. Va. 600, it was held that section 21 of chapter 116 of the Code, relative to special juries, amended in 1870, does not apply in a case of felony. In that case, the court having expressed the opinion that the prisoner was entitled to a special jury, he asked for one; and, having been convicted, on appeal to this Court it was held that under the circumstances, having asked for a special jury, he did not waive his right to be tried by the regular jury and exercise his right of challenge,—showing clearly the jealous care with which the rights of the accused in a felony case are guarded by the law. Again, in the case of *Cancemi* v. *People*, 18 N. Y. 128, the prisoner was indicted for murder, and during the trial consented to the withdrawal of a juror, and that the verdict might be rendered by eleven; and it was held that "the consent of the prisoner to his trial by less than a full jury of twelve men was a nullity, and the conviction illegal." Strong, J., in delivering the opinion of the court, said: "Criminal prosecutions involve public wrongs, 'a violation of public rights and duties,' which affect the whole community, considered as a community in its social and aggregate capacity. 3 Bl. Comm. 2; *Id.* 4, 5. * * * The state, the public, have an interest in the preservation of the liberties and the lives of the citizens, and will not allow them to be taken away 'without due process of law' (Const. art. 1, § 6), when forfeited, as they may be, as a punishment for crimes." He also quotes from 1 Bl. Comm. 133, that "natural life, being the immediate donation of the great Creator, cannot legally be disposed of or destroyed by any individual,—neither by the person himself, nor by any other of his fellow creatures, merely upon their own authority. These considerations make it apparent that the right of a defendant in a criminal prosecution to affect by

consent the conduct of the case should be much more limited than in civil cases." Concluding, the judge says: "But, when issue is joined upon an indictment, the trial must be by the tribunal and in the mode which the constitution and laws provide, without any essential change. The public officer prosecuting for the people has no authority to consent to a change, nor has the defendant. Applying the above reasoning to the present case, the conclusion necessarily follows that the consent of the plaintiff in error to the withdrawal of one juror, and that the remaining eleven might render a verdict, could not lawfully be recognized by the court at the circuit, and was a nullity." Now, if a party charged with murder could not, by consenting to a special jury, waive his right to be tried by the regular jury, could such party, by his counsel, entering into an agreement with the prosecuting attorney, select a member of the bar to hear, try, and determine his case, when the same act which allows such an agreement upon a judge provides a mode for the election of such judge by the attorneys present and practicing in the court, who are not interested in the case? It seems to me that the legislature had some object in providing two modes for selecting a judge when the regular judge was so situated that he could not properly preside. There are, no doubt, many cases presented to the intermediate court, and even to the criminal court, in which counsel might properly agree upon a special judge, under this statute; but I cannot think that this statute intends that in a case of this nature, in which the prisoners were being tried for their lives, their counsel could agree with the counsel for the State upon a member of the bar to try, hear, and determine the case.

The record shows, again, that the party who heard this case did not, before proceeding to discharge the duties of the office, take the oath prescribed by the Constitution (article 4, § 5), which provides that every person elected or appointed to any office before proceeding to exercise the authority or discharge the duties thereof, shall make oath or affirmation that he will support the Constitution of the United States and the Constitution of this State, and that he will faithfully discharge the duties of his said office

to the best of his skill and judgment, but did take the oath prescribed by chapter 20, Acts 1895, to wit, that "he would faithfully and impartially perform the duties of a judge of said court so long as he should continue to act as such; that he is not interested as counsel or attorney or otherwise in the cause to be tried by him." The oath required by the Constitution to be taken by the attornev who acted as special judge in this case was a condition precedent to any legal step in the trial, and all of the proceedings must be considered *coram non judice*.

The case having been heard and determined by a party, as special judge, who had no jurisdiction to try the same, it would serve no good purpose to pass upon the validity of the instructions given; but as the cause must be remanded, to be tried before some competent tribunal, I regard it as proper, upon the motion to set aside the verdict as contrary to the evidence, to call attention to the evidence relied on by the prosecution to convict the prisoners of the conspiracy and murder charged, and, in doing this, attention is called to the dying declarations of the deceased, which will, no doubt be attempted to be proven on a second trial, and which were allowed to be detailed by Dr. Brown in his testimony. Dr. Brown says, in asking Morris about the shooting, and after locating the place where it occurred, he inquired: " 'Do you have any idea who shot you?' He said: 'I do. Of course, I do, but I am not sure. I was shot with Burnett's little rifle, and I think Charley Burnett did the shooting.' I said, 'Why do you think that?' He said, 'Because he has threatened to do it.' Then I asked him if he had seen any one on the road who he would suspicion of having shot him. He said, 'No.' He had told me of a row that he and Mrs. John Hill had had. I says: 'Do you think Mrs. Hill did it?' He said, 'No; she didn't do it' I says, 'Do you think John did it?' He says, 'No, sir; neither of them didn't do it. They are mean enough, but they didn't do it. I think Charley Burnett did it' " This is the only testimony that implicates Charles Burnett in the homicide, except the testimony of George Flint, who states that Mrs. Hill told him that Charley and Mose Burnett would be on the mountain, waiting for him. Now, these dying declarations of Dr. Morris were inadmis-

sible, for the following reasons: They were mere declarations of opinions, and would not have been admitted if the deceased had been living, and endeavoring to give this testimony from the witness stand. In 10 Am. & Eng. Enc. Law, 376, 377, under "Dying Declarations," we find: "Dying declarations, being a substitute for sworn testimony, must be such narrative statements as would be admissible had the dying person been sworn as a witness. If they relate to facts which the declarant could have thus testified to, they are admissible. * * * Mere declarations of opinion, which would not be received if the declarant were a witness, are inadmissible. And it is immaterial whether the fact that the declaration is a mere opinion appears from the statement itself, or from other undisputed evidence, showing that it was impossible for the declarant to have known the fact stated." See *Jones* v. *State*, 52 Ark. 347, (12 S. W. 704); *Berry* v. *State*, 63 Ark. 382, (38 S. W. 1038); and Rosc. Cr. Ev., top page 54, side page 33, where it is said: "So the statement of the deceased must be such as would be admissible if he were alive and could be examined as a witness. Consequently a declaration upon matters of opinion, as distinguished from matters of fact, will not be receivable."—citing *Reg* v. *Sellers*, Carr, Supp. Cr. Law 233.

The testimony of George Flint against plaintiffs in error is only as to what he was told by Mrs. Hill, in the absence of the prisoners, Charles and Mose Burnett, as to their watching for deceased on the mountain. The alleged conspiracy to take the life of Morris is not shown by competent testimony, and in fact no testimony of any kind shows that the prisoners, Charles and Mose Burnett, entered into such conspiracy with Mrs. Hill or any other person. The testimony of George Flint should have been excluded, therefore, —as to what he states he was told by Mrs. Hill. I have thought proper to call attention to the incompetent testimony sought to be introduced before the jury upon this mistrial of the case, in order that the same testimony and dying declarations may not be relied on, should a second trial occur. The judgment is reversed, the verdict set aside, and a new trial awarded the plaintiffs in error.

BRANNON, JUDGE:

I agree to reverse, because, while the Constitution does provide for holding circuit courts where the judge is absent or cannot porperly preside, I do not think that applies to a criminal court (I do not mean a circuit court.) If the attorneys can, in a felony case, agree on a special judge, I think the order sufficient to constitute him such, though it does not call him, "special judge" as it says he was selected "to try hear and determine" the case in the words of the statute thus making him special judge. His functions and powers make him such. I do not think a special judge has to take the constitutional oath of regular permanent officers but only that prescribed by the act. I think the dying declarations and declarations of Mrs. Hill as to conspiracy not admissible though I do not see that there was objection to it in the court below or exceptions. I think the numerous instructions should be passed on for purposes of a future trial.

Reversed.

CHARLESTON.

47 739
165 774

CLARKSBURG ELECTRIC LIGHT CO. *v.* CITY OF CLARKSBURG *et al.*

Submitted January 30, 1900—Decided April 7, 1900.

1. STREET RAILROADS—*Exclusive Franchise.*

The council of the town of Clarksburg in 1887 had no power, either under its charter or under the general statute law governing towns and cities, to grant an exclusive franchise for 20 years to a private corporation to use its streets for the conveyance of electricity for public use in the city. Such exclusive grant does not prevent the town from granting to another corporation, within said term, the privilege to occu-

py its streets for the same purpose. Such exclusive grant, being void, is not a valid contract protected by the provisions in the federal or state constitutions forbidding the passage of any law impairing the obligation of contracts. (p. 735).

2. POWER TO GRANT—*Validity—Constitutional Law.*
Under the general statute law of West Virginia governing cities and towns, a grant by a municipal corporation of the privilege, not exclusive, of occupying its streets for the conveyance of electricity for public use therein, confers a valid franchise, and is a contract protected by the provisions in state and federal constitutions prohibiting the passage of any law impairing the obligations of contracts. (The question of the reasonableness of the term of such grant not considered. (p. 736).

3. CONSTRUCTION OF STATUTE—*Rule—Federal Courts.*
The decision of the highest court of a state in the construction of its statutes, and as to the validity or invalidity of contracts dependent only on such statutes, is the controlling rule of decision in federal courts, where there is no federal question. (p. 737).

4. GRANT BY CITY—*Validity—Corporation.*
The grant by a city or town to an intended corporation of a franchise to use its streets for the conveyance of electricity for public use in the town or city is valid, though at its date the corporation is not chartered, but is later chartered, and accepts the grant. (p. 742).

Appeal from Circuit Court, Harrison County.

Action by the Clarksburg Electric Light Company against the city of Clarksburg and others. Decree for defendants and plaintiff appeals.

Affirmed.

JOHN BASSELL, EDWIN MAXWELL and C. W. LYNCH, for appellant.

M. F. SNIDER and DAVIS & DAVIS, for appellees.

BRANNON, JUDGE:

On the 16th of December, 1887, the council of the town of Clarksburg passed an ordinance granting to the Clarksburg Electric Light Company the exclusive privilege for the term of twenty years to erect and operate electric light works for generating and supplying electricity for lighting the town and for use as power. Under this grant the

said corporation constructed a costly and valuable plant and has been long operating the same, supplying the town and its people with electricity for purposes of illumination and power. On the 12th of March, 1894, the Trader's Company was chartered by the State as a corporation to erect a hotel building with opera house, banking house and offices therein under which the said hotel building has been erected in Clarksburg. On the 1st day of November 1894, the State incorporated a company called the Traders Annex Company with power to erect buildings, construct electric light plant to light its buildings and the town of Clarksburg with electricity. The two last-named companies together erected an electric light plant, and have used the same for lighting the hotel, opera house, bank, and other apartments in the buildings erected by said companies. Said two companies, having a surplus of electricity, engaged to supply private individually in the town. These individuals erected poles in the streets to support wires for conveyance of electricity, by leave of the town council and the said two companies were about to obtain, or at least ask for, the authority from the council of Clarksburg to erect poles in the streets for the conveyance of electricity through the town for sale to its people, and thereupon the Clarksburg Electric Light Company sued out an injunction restraining the Traders Company and the Traders Annex Company and all other persons from applying to said council for the privileges aforesaid, and restraining the city council of Clarksburg from granting to the Traders Company and the Traders Annex Company, jointly or severally, the privilege of occupying the streets for the purpose of carrying on the business of furnishing electricity to the said city and its citizens. The circuit court of Harrison County dissolved the injunction, and the electric light company appeals to this Court.

The electric light company claims that the grant to it by the council of Clarksburg of the privilege of furnishing electricity and occupying the streets of the city with its poles for the distribution of electricity to its consumers constitutes a contract giving that company the sole and exclusive right to furnish electricity within the city, and that the use of the streets by any other company, or even

persons, for furnishing electricity, is a violation of its rights, and that the grant by the said city to the Traders Company or the Traders Annex Company, as proposed, would be a violation and impairment of such contract, contrary to the Constitution of the United States. Upon this position—that the proposed grant or franchise to the Traders Company and Traders Annex Company would be a violation of the contract subsisting between the electric light company and the city, and a violation of the Constitution of the United States—the said electric light company stakes its case in this Court. The Federal Constitution (article 1, § 10) provides that "no state shall * * * pass any law impairing the obligation of contracts." It is beyond question that a grant by a municipal corporation, under authority of the statute of a state, to a private corporation to supply a city or town with electricity for the public use, or any similar franchise, constitutes a contract, when accepted and carried out by the corporation, which is under the protection of both the State and National constitutions. *New Orleans Gaslight Co.* v. *Louisiana Light and Heat Producing and Manufacturing Co.*, 115 U. S. 650, 6 Sup. Ct. 252, 29 L. Ed. 516; *Louisville Gas Co.* v. *Citizens Gaslight Co.*, 115 U. S. 683, 6 Sup. Ct. 265, 29 L. Ed. 510. Therefore we do not question that the electric light company possesses a contract, and lawful vested rights under it; but to what extent? Has it the right to an exclusive franchise, effectually shutting out others from transacting a very important business, so needful to the public of the city of Clarksburg? Has that company the monopoly it claims? I shall not discuss the question whether an act of the legislature granting such an exclusive franchise would be valid, further than to say that under the great powers of a state legislature such an act would likely be valid under the cases just cited and others; but I can safely say that under multitudinous authorities the courts lean against construing statutes so as to grant, or to authorize municipal corporations to grant, such exclusive franchises. Such franchises constitute monopolies, which the law has through ages condemned, because they tie down and restrain and cripple the public right and interest, and sacrifice great public interests to the benefit and aggrandize-

ment of the few. Still, where such rights are valid and lawful, the courts must and do protect them. I state the proposition, as sustained by authorities in all quarters, that to authorize such exclusive franchise the statute must admit of no other reasonable construction. The ordinance of Clarksburg granting to the electric light company its franchise does, in terms, make it exclusive; but had the council power to insert in the franchise the clause or section granting such exclusive right? That is our question in this case; that is the pivot of this case. Turn to the statute law on the subject. The town of Clarksburg was incorporated by an act of Virginia of March 15, 1849, which gave its trustees power to "improve streets, walks, and alleys." An act of February 27, 1867, gave the town "control of all county roads, turn-pikes, and bridges within the limits thereof." The Virginia Code of 1860, applying to towns generally, gave the council "power to lay off streets, walks, or alleys, alter, improve, and light the same, and have them kept in good order." The Code of West Virginia of 1868, page 329 (Ed. 1891, page 426), the law in force when the franchise claim by the plaintiff was granted, and which applied to towns generally, provides that "the council of such city, town or village shall have power therein to lay off, vacate, close, open, alter, curb, pave and keep in good repair, roads, streets, alleys, * * * and to improve and light the same." No statute special to Clarksburg has been cited giving it power to confer such exclusive privilege. If the power to improve and light its streets does not authorize such exclusive franchise, it does not possess the power. If the general law governing cities and towns above quoted does not give Clarksburg's council power to grant such exclusive franchise, it does not possess the power. That the council, under the charter provisions and general statutes above quoted, does not possess the power to grant such exclusive franchise is settled by *Parkersburg Gas Co.* v. *Parkersburg*, 30 W. Va. 435, (4 S. E. 650). That case has been approved by the opinions since delivered in *Richards* v. *Clarksburg*, 30 W. Va. 496, (4 S. E. 774), and *Arbenz* v. *Railroad Co.*, 33 W. Va. 6, (10 S. E. 14,) 5 L. R. A. 371, and is thus the settled law of this State. That case holds that neither the char-

ter of Parkersburg, which was general, like that of Clarksburg, in this respect, nor the general statutes in relation to municipal corporations in force in 1864, which were the same as those quoted above, "conferred upon said city power to delegate to a private corporation the exclusive privilege of using the streets and alleys for laying gas pipes, and furnishing the city and its inhabitants with gas for thirty years. The grant by a city to a gas company of the exclusive privilege of lighting the city with gas does not deprive the city of the power to contract with an electric light company for lighting the city with electric lights." This denial of power in a municipal corporation merely under general statutes giving it control of streets and authority to light them is based on many decisions. 2 Dill. Mun. Corp. § 692; Elliott, Roads & S. 566; Boone, Corp. p. 35; *Grand Rapdids E. L. & P. Co.*, v. *Grand Rapids E. E. & F. G. Co.* (C. C.) 33 Fed. 659. This incapacity of Clarksburg to make such an exclusive grant results from the law generally prevalent that "a municipal corporation possesses and can exercise the following powers, and no others: First, those granted by express words in its charter, or the general statutes under which it is incorporated; second, those necessarily or fairly implied in or incident to the powers thus expressly granted; and third, those essential to the declared purposes of the corporation, not simply convenient, but indispensable." *City of Charleston* v. *Reed*, 27 W. Va. 281; *Christie* v. *Malden*, 23 W. Va. 667. Surely, we cannot say, contrary to the drift of all the law of the country, that the mere power to control streets and light the same carries with it by implication the enormous power to tie the hands of an important municipality for many years, or that such a power is indispensable or necessary to enable the municipality to carry out its legitimate functions. Therefore, the council of Clarksburg had no authority to grant this exclusive franchise, and that feature of its ordinance is *ultra vires*, and therefore void, confers no right, makes no contract, and the case falls under the principle, self-evident, stated in *New Orleans* v. *New Orleans Waterworks*, 142 U. S. 79, 12 Sup. Ct. 142, 35 L. Ed. 943, that, "before this court can be asked to determine whether a statute has impaired the

obligation of a contract, it must be made to appear that there was a legal contract subject to impairment." The electric light company has no contract good in law to be impaired, so as to call on either State or Federal Constitution for protection.

Counsel for the electric light company cite for its support the cases of *New Orleans Gaslight Co.* v. *Louisiana Light and Heat Producing and Manufacturing Co.*, 115 U. S. 650, 6 Sup. Ct. 252, 29 L. Ed. 516, and *Louisville Gas Co.* v. *Citizens Gaslight Co.* 115 U. S. 683, 6 Sup. Ct. 265, 29 L. Ed. 510, but they do not apply, because in those cases the legislature, under its plenary power, had granted the exclusive franchise. As I said above, under the authority of those two cases, and I should add the *Slaughter-House Cases*, 16 Wall. 36, 21 L. Ed. 394; *New Orleans Waterworks, Co.* v. *Rivers*, 115 U. S. 674, 6 Sup. Ct. 273 29 L., Ed. 525, and *St. Tammany Waterworks Co.* v. *New Orleans Waterworks*, 120 U. S. 64, 7 Sup. Ct. 405, 30 L. Ed. 563, I do not question the power, though I should question the policy, in a legislature to grant such an exclusive privilege; but those cases cannot help the plaintiff, because they involve legislative grants, whereas the plaintiff in this case can appeal to no such legislative grant, but only to a council grant, warranted by no legislative authority conferred upon that council, and not justified by the special legislation relative to Clarksburg, or the general law. I should confirm the position just stated by a reference to the case of *City of Walla Walla* v. *Walla Walla Water Co.*, 172 U. S. 1, 19 Sup. Ct. 77, 43 L. Ed. 341, where the court asserts that, to make a grant of a franchise to furnish water to a city made by its council such a contract as is protected by the United States Constituton, the council must have authority to make such grant, So the decision of this Court in *Parkersburg Gas Co.* v. *Parkersburg*, is well fortified by decisions elsewhere. But suppose it were not so fortified. It would be the law governing this Court, and would show that the electric light company cannot appeal to the National Constitution to protect its exclusive grant. Whether that company has or has not a valid contract depends on State law exclusively. It depends on the question whether that clause in the ordinance of the council of Clarksburg

is warranted by the statute of the State relating to Clarksburg as a municipal corporation. Clarksburg is a municipal corporation in the State of West Virginia, and its rights are governed by and originate from State law. So with the other companies. Whether that exclusive grant makes a valid contract is to be tested by decisions of the State Supreme Court. The right depends on the construction of State statutes as to the power of the council in the matter. As long ago as *Ogden* v. *Saunders*, 12 Wheat. 259, 6 L. Ed. 606, the supreme court said: "It is the municipal law of the state, whether that be written or unwritten, which is emphatically the law of the contract made within the state, and must govern it throughout, wherever its performance is sought to be enforced." The decision of the state court of last resort upon rights dependent alone upon its laws, its statutes, is conclusive upon the Federal judiciary. In *Louisville N. O. & T. Ry. Co.* v. *Mississippi*, 133 U. S. 587, 10 Sup. Ct. 348, 33 L. Ed. 784, it was held that "the construction of a State statute by the highest court of the State is accepted as conclusive in this Court." In *Detroit* v. *Osborne*, 135 U. S. 492, 10 Sup Ct. 1012, 34 L. Ed. 260, the supreme court, nnding that the supreme court of Michigan had held that under a statute of that state there was no right of action to a person injured by reason of a defect in a sidewalk, caused by neglect of the city, although the Supreme Court of the United States differed with the Michigan court, and also said that the current of authorities differed from that court, yet followed the state decision. Justice Brewer said: "But, even if it were a fact that the universal voice of the other authorities was against the doctrine announced by the supreme court of Michigan, the fact remains that the decision of that court, undisturbed by legislative action, is the law of that state. Whatever our views may be as to the reasoning or conclusion of that court is immaterial. It does not change the fact that its decision is the law of the state of Michigan, binding upon all its courts, all its citizens, and all others who may come within the limits of the state. The question presented by it is not one of general commercial law; it is purely local in its significance and extent. It involves simply a consideration

of the powers and liabilities granted and imposed by legislative action upon cities within the State. While this court has been strenuous to uphold the supremacy of Federal law, and the interpretation placed upon it by the Federal Courts, it has been equally strenuous to uphold the decisions by state courts of questions of purely local law. There should be, in all matters of a local nature, but one law within the state; and that law is not what this court might determine, but what the supreme court of the state has determined." Again and again has the United States Supreme Court announced this doctrine. *Morely* v. *Railway Co.*, 146 U. S. 162, 13 Sup. Ct. 54, 36 L. Ed. 925; *Irrigation Dist.* v. *Bradley*, 164 U. S. 112, 17 Sup. Ct. 56, 41 L. Ed. 369; *First Nat. Bank of Aberdeen* v. *Chehalis Co.* 166 U. S. 440, 17 Sup. Ct. 629, 41. L. Ed. 1069; *Marchant* v. *Pennsylvania R. Co.*, 153 U. S. 380, 14 Sup. Ct. 894, 38 L. Ed. 751; *Wade* v. *Travis Co.*, Tex., 174 U. S. 508, 19 Sup. Ct. 715, 43 L. Ed. 1060. In *Railroad Co.* v. *McClure*, 10 Wall. 511, 19 L. Ed. 997, it is held that there is no jurisdiction in the supreme court, under section 25 of the judiciary act, to review a decision of the highest court of a State maintaining the validity of a law alleged to impair a contract, "when the law set up as having this effect was in existence when the alleged contract was made, and the highest state court has only decided that there was no contract in the case." Just so in the present case. The statutes testing the right of the electric company were in force when its franchise was granted, and the decision in *Parkersburg Gas Co.* v. *Parkersburg*, holding that under those statutes such exclusive grant could not be made, had been rendered. Now, if the decision of the State Supreme Court upon a State statute and rights dependent upon it are not conclusive, even upon the Federal Supreme Court, the State is a nonentity, a myth. No political party since the birth of the Federal Constitution, not even the most ultra centralizationists, so called, have ever made any such contention.

The case of *City R. Co.* v. *Citizens' St. R. Co.*, 166 U. S. 557, 17 Sup. Ct. 653, 41 L. Ed. 1114, is invoked in favor of the plaintiff. It holds that an exclusive privilege to a street-railway company to occupy streets for thirty years

constituted a contract which could not be impaired by a grant from the city to another company to exercise the same privilege of carrying on the like business in the same streets. But that case cannot help the plaintiff. That was a valid contract, because the city had authority to grant the exclusive franchise under state statutes, as had been held by the supreme court of the state. That made the franchise valid, as if it had been granted by the legislature itself, as in the case of *New Orleans Gaslight Co.* v. *Louisiana Light and Heat Producing & Manufacturing Co.* 115 U. S. 650. 6 Sup. Ct. 252, 29 L. Ed. 516, and other cases cited above. That this is so is made clear in the opinion by Justice Brown, saying: "That the complainant had a contract with the city is entirely clear. It was so held by the supreme court of Indiana in *Western Paving and Supply Co.* v. *Citizens' St. R. Co.*, 128 Ind. 525, 26 N. E. 188. 28 N. E. 88, 10 L. R. A. 770." The supreme court simply followed the rule stated above that the decision of the state court as to whether there is or is not a contract valid under state law is final. There the railroad company had a valid franchise conferred by state law, as construed by the state court; whereas in this case the electric light company had no valid exclusive right under the West Virginia statute law as construed in *Parkersburg Gas Co.* v. *Parkersburg*. The difference between the two cases is plain and wide. In the one case a valid contract; in the other no contract. Counsel for the electric company cites the case of *Citizens' Sav. Bank of Owensboro* v. *City of Owensboro*, 173 U. S. 636, 19 Sup. Ct. 530, 43 L. Ed. 840. I am unable to see that the case contains anything bearing upon this case.

As to the argument that upon the faith of such exclusive grant the electric company has spent much money, I have only to reply, that can have only a moral, not a legal, effect, and that the company was bound to know the law, and look out for its rights, under the principle that "persons dealing with a corporation must take notice of what is contained in the law of its organization, and must be presumed to be informed of the restrictions annexed to the grant of power by the law by which the corporation is authorized to act." *Smith* v. *Cornelius*, 41 W. Va. 59, (23 S.

E. 599), 30 L. R. A. 747; *McCormick* v. *Bank*, 165 U. S. 549, 550, 17 Sup. Ct. 433, 41 L. Ed. 817; Clark Corp. 174.

As to the claim that Clarksburg has ratified and confirmed this void exclusive feature in the franchise of the electric company by buying from it electricity to light the streets: This is strange doctrine. A void contract cannot be so ratified by mere implication. If the council was without power to expressly grant such exclusive right, it is illogical to say that it can confirm and make it good *abinitio* by mere implication from its dealing with it. Of course, the entire grant is not void, but only the exclusive clause; and the mere purchase by the city from the company of electricity would not ratify the void clause anyhow, because it could purchase under the general power of the company, without reference to that void clause. Ratification and acquiescence cannot be invoked to legalize contracts of a municipality made by its officers in excess of authority, even though the contract has been performed by one of its parties. 2 Mor. Priv. Corp. §§ 621, 718.

The defendant corporations raise the point against the plaintiff corporation that it had no charter existence on the day of the grant to it of the franchise in question, and that, not being in *esse* then, the grant did not vest, but was abortive, like the case of a grant of land to a grantee not in being. I do not think the point tenable. I think the Clarksburg Electric Light Company is vested with a valid franchise, except as to the exclusive feature. In *Spring Garden Bank* v. *Hurlings Lumber Co*, 32 W. Va. 357 (9 S. E. 243), 3 L. R. A. 583, it was held that after corporators had signed an agreement preliminary to a certificate of incorporation, and before it had issued, a deed for land to such corporation, delivered in escrow, to be delivered when the corporation should obtain its charter and organize, and it was so delivered after the charter obtained and organization, the deed was good to convey the land. In this case the agreement had not been signed for the formation of the corporation at the date of the town ordinance, and yet I think that ordinance valid. We must not apply the strict rule applicable to deeds of land to the present case. Deeds require actual delivery to a grantee,

but such an ordinance as this requires no delivery, only acceptance, and it was accepted by the corporation when it came into legal being. That is enough. I have no doubt that a deed for land made to a corporation named before incorporation, and so dated, but delivered after incorporation, would be good. The date of delivery and acceptance can be shown. It is never a deed until acceptance. *Guggenheimer* v. *Lockridge*, 39 W. Va. 457 (19 S. E. 874); 5 Thomp. Corp. § 5802. The latter authority says that "a deed of conveyance of land to an intended corporation before its organization will take effect upon the event of its organization; for its acceptance of the deed, when it becomes capable of accepting, will be presumed." Much more so in this case, where certain persons intending to form a corporation solicit and are tendered such a franchise as this, and they proceed to become incorporated. It was intended to operate only in the event of incorporation, and when it should take place. No delivery was necessary. Acceptance is all-sufficient to put the ordinance into operation. Then it took effect; not till then. *Richardson* v. *Graham*, 45 W. Va. 134 (30 S. E. 92). Our conclusion is to affirm the decree.

Affirmed.

CHARLESTON.

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HEROLD *et al. v.* BARLOW.

Submitted Januray 24, 1900.—Decided April 7, 1900.

1. CONVEYANCE—*Insolvent Consideration—Fraudulent—Void.*
A conveyance, in consideration of an antecedent debt, from an insolvent to his creditor, without fraudulent intent in the

creditor, though the creditor know of the debtor's insolvency, does not, alone, stamp the conveyance as one fraudulent in fact and utterly void; but it stands for the benefit of all creditors, including, the one thus preferred. (p. 754).

2. INSOLVENT DEBTOR—*Grantee—Cash Payment.*
A conveyance by an insolvent debtor to a *bona fide* grantee, for valuable consideration, not a debt, is valid, and not subject to be held a preference under Code 1891, chapter 74, section 2; and if the consideration is part cash, and part an antecedent debt due from the insolvent to the purchaser, the conveyance will be held as a preference inuring to the benefit of all creditors of the insolvent, beyond the cash payment; but the purchaser will be preferred, to the extent of such prior liens on the property, he will be substituted to such cash payment over general creditors. (p. 754)

3. INSOLVENT—*Conveyance—Preference—Purchaser.*
In a conveyance by an insolvent debtor, operating, under Code 1891, chapter 74, section 2, as a preference, and standing for the benefit of all creditors, if the purchaser discharge liens, and accorded their priority. (p. 755).

4. INSOLVENT DEBTOR—*Creditors—Purchaser—Liens.*
In a conveyance by an insolvent debtor, operating, under Code 1891, chapter 74, section 2, as a preference, and standing for the benefit of all creditors, if the purchaser pays off debts of the insolvent, at his request, as part of the consideration, though such debts are not liens, they will be treated as if cash paid by the purchaser, and he will have preference therefor over other general creditors. (p. 762).

5. ACTION—*Limitation—Laches—Preference.*
A suit to overthrow a conveyance made prior to February 20, 1895, as a preference prohibited by Code 1891, chapter 74, section 2, will be barred by laches, unless excused. In this instance, the conveyance being on record, a delay of four years and four months was held to bar such suit. If such a conveyance since that date, suit must be brought within one year from its date, and, if recorded within eight months after its date, the suit must be within four months after such recordation, under chapter 4, Acts 1895. (p. 763).

Appeal from Circuit Court, Pocahontas County.

Bill by Andrew Herold and others against Amos Barlow and others. Decree for plaintiffs, and defendant, Amos Barlow, appeals.

Reversed.

BROWN, JACKSON & KNIGHT, for appellant.

H. S. RUCKER, for appellees.

BRANNON, JUDGE:

On the 19th of September, 1891, and for a considerable time prior thereto, Horace M. Lockridge was engaged in the business of a real-estate agent, and buying and selling lots, at a town called "Buena Vista," in Virginia. Buena Vista is what is known as a "boom town," where lots at one time sold at fabulous prices, and then collapsed and fell to nominal prices, or became wholly unsalable. Lockridge had been raised in Pocahontas County, in this State, and went from there to Buena Vista, where he resided, and engaged in the business just stated. He dealt largely in lots at that place; bought and sold a great many; carrying on transactions quite large; handling a great deal of property. In addition to the real-estate business, he carried on a retail store. He became largely indebted to wholesale merchants for goods purchased for that store, and for purchase money on lots in Buena Vista. He owed bank notes in West Virginia. He owed divers people in the county of Pocahontas. He was very largely indebted on the 19th of September, 1891. Prior to that date judgments had been rendered against him in Pocahontas, which he could not pay. One of these judgment creditors (Sharp), if not others, was pressing him for payment; threatening him with chancery proceedings in Pocahontas to sell a valuable tract of land owned by him in that county. He owed also in that county a good many other debts, not yet carried into judgment. He owned two other parcels of real estate of smaller value, in Pocahontas; having liens resting thereon for purchase money. He owned the store in Buena Vista, worth about three thousand dollars. He owned a very considerable number of lots in Buena Vista, bought at high prices. Lots in that boom town had been, up to 1891, commanding high prices; but at some time prior to September 19, 1891, the boom or inflated prices of those lots suffered serious decline, and finally collapsed. Just when this decline began, the evidence does not distinctly say; but it is fair to say that it began prior to September 19, 1891, and that on that date

lots had already suffered very serious decline, and were then of slow sale at prices greatly reduced from their cost, —practically unsalable at that date. Lockridge states that he had in his various transactions in real estate prior thereto made a great deal of money, but that he had reinvested it in numerous lots, and that the collapse in prices caught him with them on hand, and thus ruined him, and the lots were sold from him for unpaid purchase money. He then owed a large indebtedness to parties in West Virginia, Virginia, and considerable in Baltimore. The evidence makes it clear that on the 19th of September, 1891, he was greatly distressed for money; judgments against him threatening his land in Pocahontas County; his Buena Vista lots under liens for unpaid purchase money, which he could not pay; and thus the lots were in certain and imminent danger of being sold under trust deeds made to secure the purchase money. He was already sued in Virginia for debts, and was in imminent danger of further suits there. His creditors were clamorous and uneasy. He was surely insolvent on the 19th of September, 1891. It is useless to detail evidence under this head. It would be a mere detail of mere evidence, illustrating no legal principle, and I will not detail the volume of circumstances touching his insolvency. He states under oath that he was then insolvent, but it does not need his admission to show such to be the fact. The great number and volume of his debts, and the transparent fact that his property would not pay them, as so much was unsalable and unavailable, and soon came to nothing, as he states, coupled with the fact that he soon transferred his store to his wife, and that his lots were sold away from him for purchase money,—these facts and many other circumstances tell too plainly of his financial collapse. His insolvency is not a probability, but a strong probability,—a certainty. When he sold his farm in Pocahontas, the debts appeared large,—those in West Virginia,—and the Virginia and Baltimore debts were large; and his Virginia lots were utterly inadequate to pay them, and those debts remain yet unpaid. All these circumstances existing on the 19th of September, 1891, and revealed by subsequent events given in evidence, show beyond question that Lockridge was inso

vent, in a legal sense, on that date; that is, all his property was not then adequate to pay all his debts. He was not only insolvent in the sense of the bankrupt law, on account of his failure and utter inability to meet his obligations in due course of maturity, but he was insolvent within the meaning of our statute against preferences; that is, all his property would not pay all his debts. *Weigand* v. *Supply Co.* 44 W. V. 133, (28 S. E. 803). By deed dated September 19, 1891., Lockridge conveyed to Amos Barlow and Henry Barlow the said valuable tract of land in Pocahontas County for the consideration of twelve thousand dollars, as stated in the deed, but which was in fact eleven thousand dollars, as all admit. This consideration was paid partly in antecedent debts due from Lockridge to the Barlows. It was partly paid by the transfer to Lockridge's wife of three thousand five hundred dollars of stock of a corporation doing a real estate business at Buena Vista, called the Pocahontas and Greenbrier Investment Company, of which Amos Barlow and his wife owned two thousand five hundred dollars, and C. R. Moore, a son-in-law of Amos Barlow, owned one thousand dollars. As further payment, the Barlows discharged various liens recorded and binding the said land, and they also paid a very considerable amount of other debts against Lockridge, at his request, and they paid him cash two hundred and one dollars, and some taxes on the land; and for the balance, of one thousand one hundred and twenty-nine dollars and twenty-nine cents, Amos Barlow gave to the wife of Lockridge a check on a bank. The said deed from Lockridge to the Barlows named Lockridge and his wife and his mother (the last owning a dower right in the land) as grantors. It was acknowledged and executed by Lockridge and his mother on its date, and recorded September 21, 1891. That deed was not executed by the wife of Lockridge, but this was cured by another deed, dated September 22, 1891, executed and acknowledged in Virginia; she being there, and not in Pocahontas County, where the former deed was executed. On the 6th of January, 1896, Andrew Herold attacked this conveyance by a bill in equity in the circuit court of Pocahontas County, claiming that the said conveyance from Lockridge to the Barlows was made with the purpose and

intent to hinder, delay, and defraud the creditors of Lockridge, and, if not made with such purpose and intent in the mind, it was made when Lockridge was insolvent, and that said conveyance should, under that provision of Code 1891, chapter 74, section 2, forbidding a preference of creditors, be held to be for the common benefit of all the creditors of Lockridge. Herold's bill states that he was Lockridge's indorser on certain notes, and that Mathews, as their holder, had obtained judgments on the same for upwards of nine hundred dollars, and that on another note, on which Herold was Lockridge's indoser, a decree had been obtained by Dennis for one thousand four hundred and sixty-one dollars and fifty cents, which debts antedated the said deed. In this suit a decree was entered holding that, when the said conveyance from Lockrigde to the Barlows was made, Lockridge was an insolvent debtor, and that the said deed was an attempt to give preference to certain creditors to the exclusion and prejudice of others, and that the said conveyance was void, and that the said conveyance should be held as made for the benefit of all the creditors of Lockridge. From this decree Amos Barlow, to whom Henry Barlow had conveyed his interest in said land, took an appeal.

1. Is the conveyance from Lockridge to the Barlows fraudulent in fact? This is an important question, because, if fraudulent in fact, it would be utterly void, and the Barlows would save nothing from the wreck. At the threshold of this question, we must remember a very material fact, of controlling effect in law. The Barlows had honest debts against Lockridge. By the common law it is perfectly lawful in a creditor to obtain, and in a debtor to give a creditor, preference over other creditors, if the intent is merely to prefer a creditor, and not to hinder or defraud other creditors. Such preference may injure, but it does not defraud, other creditors. It makes no difference how zealous, how urgent, that creditor may be to save himself by securing such preference. It makes no difference that such preference even absorb or exhausts the property of the debtor, leaving nothing for other creditors. It makes no difference about the secret motives of the creditor, as the law takes no cognizance of such mo-

tives, and cannot assign a bad motive to an act not wrong either in itself or in its consequences, because, in law, a motive having a lawful end in view, and resulting in proper action, not condemned by law, cannot be called a bad motive. Here self-preservation is regarded as the law of nature. It makes no difference that the creditor knows that the party is insolvent when he gets his preference. It makes no difference that the creditor apprehends attachment or other legal proceedings by other creditors, and is therefore moved to diligence and astuteness in getting ahead of other creditors, and obtaining a preference before other creditors attach, and thus defeat their attachment. He defeats other creditors lawfully to save his own honest debt. He simply uses diligence to save himself, and the law rewards that diligence by giving him its fruits. *Harden* v. *Wagner*, 22 W. Va. 356; *Skipwith's Ex'r* v. *Cunningham*, 8 Leigh 271; Bump. Fraud. Conv. §§ 165, 167, 168, 170, 171, 183; Wait, Fraud. Conv. § 390. For a collection of cases to sustain these principles, I would cite that very valuable late work, 1 Am. & Eng. Dec. Eq. 148, 149. It is immaterial how such lawful preference is accomplished,—whether by absolute conveyance of the fee, or by mere mortgage or judgment. Under these principles of law, we cannot convict the Barlows of intentional fraud from the fact, alone, that they by that deed obtained preference for their debts over other creditors. I say "intentional fraud;" for though, under the Code provision forbidding preferences by an insolvent, a deed may be held to be a conveyance for the benefit of all creditors, because it is a preference forbidden, yet this is not because it is fraudulent in fact,—intentionally fraudulent as against other creditors,—but only fraudulent in law, or, rather, not fraudulent at all, but simply a conveyance operating as a trust for the benefit of all creditors. The mere fact that it is a preference does not make it corrupt. As the law before the statute allowed such preference without attributing fraud to it, such is still the nature of the act, so far as fraud in fact is concerned. The statute does not stamp it as fraudulent in fact. But for this consideration, there are facts and circumstances in this case which would stamp the transaction with fraud. For instance, a letter

from Amos Barlow to Lockridge, August 24, 1891, saying: "Bro. Henry came here today, and asked me to write to you privately, and wanted me to go in with him and sell out to you all that we had at Buena Vista,—include the bond vs. you and I. B. M., lift the liens vs. your land, and take a deed of trust on said farm; he or us to raise you as much money as possible to help you out there. Now, if there is any way to make things better, so as not to hurt either you or us, let us know, as he says he will raise the money to suit you as soon as possible, but would have to have time to collect and borrow. He says he is tormented by somebody near home, and is going to close out at Buena Vista some way; he is nearly wore out by the harangue. I agreed to join him in anything he and you do. So, if there is any way you can buy us out and be safe yourself, let us know at once. Private." This letter is appealed to as strong evidence of fraud, but, in the light of the law principles above stated, it is not.

Amos Barlow and wife and a son-in-law, Moore, owned three thousand five hundred dollars stock in the Pocahontas and Greenbrier Investment Company, operating at Buena Vista, of which company Lockridge was president and a large stockholder. The Barlows clearly felt unsafe about its solvency (I mean, the worth of the stock), and they were anxious to dispose of it, so as to save it. Henry Barlow had invested, through Lockridge, in a lot at Buena Vista, which he later sold to Lockridge & Adams, partners, for which the purchasers were to assume the purchase money debt, of six hundred dollars, due from Barlow, and thereafter pay him one thousand one hundred and sixty dollars. Henry Barlow felt anxious about this matter. The Barlows, as appears from the letter above, wanted to sell Lockridge this stock, and secure its price by a deed of trust on the farm in Pocahontas, and also secure the debt due to Henry Barlow on the Buena Vista lot, in a trust on said farm, and also secure in like manner a bond of one thousand dollars due Henry Barlow from Lockridge. To accompilsh these things, they were willing to advance some money for Lockridge's relief. They had the right to do all this. They could sell the stock to Lockridge, and secure its price on the farm. The fact that they wanted

it kept private does not brand fraud upon the transaction, as they had the right to act in privacy in a lawful business transaction. And it is explained in the evidence that such privacy was desirable on the part of one of the Barlows, because his wife was very much dissatisfied about his investments at Buena Vista through Lockridge. This letter unquestionably shows that the Barlows knew of Lockridge's financial embarrassment, but the law says that knowledge of even insolvency of a debtor will not vitiate a preference. Evidence shows that one of the Barlows asked a lawyer whether judgments in the Federal court against Lockridge would be liens on the Pocahontas land. He also apprehended that there might be an attachment for Virginia debts. But authorities cited above will show that a creditor may take a preference to save himself, even though he is sure that the next day an attachment will be levied. If he does no hurt to other creditors, beyond taking a preference. his preference stands good and unstained with fraud. The consideration stated in the deed is twelve thousand dollars, whereas the actual consideration was eleven thousand dollars; but it is fairly shown that this circumstance was accidental, not intentional. The price demanded by Lockridge was twelve thousand dollars, and the attorney who drew the deed, when told that the parties had consummated their deal, assuming that that was the consideration, so stated it in the deed. The mistake was observed by one of the Barlows, and he wanted it changed, but Lockridge persuaded him that it would make no difference; remarking that, if anything should come against the land, it would be better to have the larger consideration stated. This is a circumstance against Barlow, but only a circumstance, and is not conclusive of fraudulent intent, as Barlow showed a desire to have the true amount stated; showing that he had no bad intent. It is urged that great haste in recording the deed was shown. It was executed Saturday evening, late, and had to be taken into the country four miles, to be executed by Lockridge's mother, and was to be returned and recorded that night, but came too late. The deed was to be delivered to Baxter, a young man, nephew of the Barlows, and a clerk in the store of one of them; he having made up the compli-

cated account of items entering into the consideration. He was to receive this deed when it should be returned, for the Barlows, and put it on record. The lawyer who drew the deed and was to pass on its sufficiency, and who was the notary who went to the country to take the acknowledgment of Mrs. Lockridge, handed it to Baxter on Sunday morning, with the cautionary remark that the deed should be recorded at an early date, as it would be necessary to do so, if Baxter knew the parties to the deed as well as other people did; referring, as Baxter thought, to Lockridge. Baxter says this moved him to record the deed promptly, and he procured the clerk to admit it to record between three and four o'clock Monday morning. It seems that Baxter was up very early, mailing some letters, as the mail left very early. Now, all this was in the absence of the Barlows. One of them had merely said to Baxter, if the deed was returned in time Saturday night, to see if it had been acknowledged; giving him no directions as to recording it. But what if the Barlows had themselves directed this prompt recordation? Under the law above stated, they had the right to do so. May not a purchaser promptly record his deed? As we have above seen, a man may obtain a preference, if he fears an attachment by another creditor to be imminent; and surely he can record his deed at once, to save himself from such attachment. If the deed is valid, its hasty recordation cannot invalidate it.

There is a circumstance which tends pretty strongly against the Barlows under this head of actual fraud. It is the only circumstance that has any appreciable weight with me towards branding the transaction with actual fraud on the part of the Barlows. While the law allows a man to purchase, *bona fide*, property from an insolvent, or to take any steps necessary to save himself by preference, he must do so without intent further to harm others than his mere purchase or preference. "A transfer may be fraudulent, although it is made in consideration of an honest debt, for an honest claim may be used as a cover to a covinous transaction. The distinction is between a transfer made solely by way of preference of one creditor over others, and a similar transfer made with a design to

secure some benefit or advantage therefrom to the debtor, or to delay creditors in the collection of their debts." Bump. Fraud. Conv. § 172. A balance of the consideration of the conveyance going to Lockridge after the abatement of the stock in said company, liens and debts paid by Barlows, and payment of debts due them from Lockridge, and the sum of two hundred and one dollars paid him in cash, which balance was one thousand one hundred and twenty-nine dollars and twenty-five cents, was paid by the check of one of the Barlows to Lockridge's wife, and one thousand seven hundred dollars of said corporate stock was some time afterwards transferred to his wife; and a lot in Buena Vista, which had been sold in June, 1891, by Henry Barlow to Adams & Lockridge was also conveyed October 8, 1891, to the wife of Lockridge. It seems that the transfer of the stock to Mrs. Lockridge was not agreed upon at the date of the transfer ot the farm by Lockridge to the Barlows, but was an afterthought of Lockridge; and the Buena Vista lot had been sold by Henry Barlow to Adams & Lockridge long before, and the debt therefor due Henry Barlow was a part of the consideration for the farm, and the lot was, by after request of Lockridge, conveyed to his wife. These things do shade the transaction with the look of bad intent on the part of the Barlows, because they tend to show that they not only wished to convert their stock and debts against Lockridge into this farm, and thus save themselves, which they lawfully might do, but were aiding Lockridge in screening the balance of the purchase money and some of the stock and the Buena Vista lot from others creditors, by conveying them to Lockridges wife. But are these circumstances sufficient to overthrow the deed? They verge upon it, but the law says that fraud in fact must be clearly and fully proved. If these circumstances stood alone, they might be sufficient to invalidate the transaction, but they lose force when connected with the fact that the Barlows were doing only a lawful act in securing themselves. These circumstances are not sufficient to overthrow the transaction. I have no doubt that Lockridge intended to sell that farm, prefer his Pocahontas friends, get some money from it, and screen it from his creditors, as well as any other

property he could likewise save to his wife; but his intent, though fraudulent, will not destroy the Barlows, unless we can fix upon them, by such full proof as the law requires to establish fraud, notice of Lockridge's fraudulent intent. And just here there occurs to me a proposition of law which goes far to sustain this action of Lockridge in having the check and transfers made to his wife, and considerably relieves this apparent badge of fraud. In the case of *Glascock* v. *Brandon*, 35 W. Va. 84, (12 S. E. 1102), it is held that, if a married woman relinquishes her contingent dower under a promise at or about the time by her husband that other property shall be settled on her in compensation for such relinquishment, the settlement will be good against creditors having no specific lien, up to the value of the dower right relinquished. It may be that in this case the property transferred to the wife is in excess of her contingent dower. That would be a matter in a suit between the creditors and Mrs. Lockridge. The transfer would be good to the extent of her dower, and for the excess it would stand for creditors. I use this view in this case to show that, in a legal point of view, it detracts from the force of such transfer to the wife as evidence to sustain the charge of fraud in fact. It goes far to relieve the tinge upon the transaction which at first blush is caused by the transfer of the stock and Buena Vista lot and check to Mrs. Lockridge. Lockridge swears that the check for the balance of purchase money was made to his wife in consideration of her expectant dower, and I do not see that that would be excessive as a compensation for her expectant, contingent dower. As for the transfer of the stock and lot to Mrs. Lockridge, I think that was not arranged at the date of the deed, but a subsequent arrangement; and, if so, it could not retroact, and make the deed, if valid at its date, invalid. So I have concluded that the deed from Lockridge to the Barlows cannot be overthrown for fraud in fact. I will not say that this conclusion is absolutely clear to my mind, but it is more satisfactory than would be an opposite decision. I have detailed circumstances too much. Though practiced, it is wrong to incumber opinions with details of evidence or circumstances. A judge, however, often does so, feeling that counsel expect it. It

is, in my opinion, very objectionable practice. An opinion full of mere facts is no precedent in other cases. An opinion should merely state results or conclusions from the evidence, and state the legal propositions; for it is the purpose of opinions to state law, that it may be used in future cases, and not detail mere evidence.

2. The conveyance from Lockridge to the Barlows, though not fraudulent in fact, is partially a preference by an insolvent debtor, and in law would inure to the benefit of all creditors, under Code 1891, chapter 74, section 2, because, when made, Lockridge was clearly insolvent. The Barlows were fully apprised of Lockridge's financial embarrassment, if not of his total insolvency; but that is immaterial, as his mere insolvency brings the deed under said Code provision, whether the Barlows knew of it or not. *Wolf* v. *McGugin*, 37 W. Va. 552, (16 S. E. 797). I think therefore, that so far as regards all the debts due from Lockridge to the Barlows, including the debt on the lot in Buena Vista, the said deed was simply a preference. I think that as to the cash paid, and the transfer of the stock in the Pocahontas and Greenbrier Investment Company, it is not a preference, under the statute, but is to be regarded a sale, and that, if the court were in the situation to declare the deed a preference, the Barlows would be given preference out of the proceeds of a sale of the farm, if one could be ordered. And why? Because the said statute does not at all prohibit a sale by even an insolvent, but only a preference. It innovates upon the common law only so far as to forbid an insolvent from preferring particular creditors. If a man purchase of an insolvent a farm at one thousand dollars cash, *bona fide*, the deed is good. If he pays nine hundred dollars of it in cash, and one hundred dollars in an antecedent debt due from grantor to grantee, reason and justice require that so far as the transaction is a cash purchase, valid under the law, it should stand good, and, so far as it is a purchase with an antecedent debt, it is a preference under the statute, and, if the farm be sold by the court, the purchaser should get his nine hundred dollars back first, and the residue should go to all creditors, including the purchaser, for his one hundred dollars. This carries out the statute,—goes as

far as it intended to go,—and adjusts the equities between the parties conformably to the intent of that statute. So we have held in *Carr* v. *Summerfield*, 34 S. E. 804. Those debts which were liens on the land at the date of said deed would go to the benefit of the Barlows, by subrogation. They stood good against other creditors of Lockridge, and the Barlows, having paid them off, would occupy the shoes of the owners of such liens. That would do no wrong to other creditors, as they were already subject to such liens. I think, too, that as the Barlows paid to Hevner and others, who were general creditors of Lockridge, valid debts, the Barlows would get the benefit of them over other creditors even. Why? Because those creditors could lawfully receive cash in payment of their debts, and also because the Barlows furnished cash to pay them; and this is just the same as it would be if paid to Lockridge.

3. Under the principles above stated, Herold and other creditors of Lockridge would be entitled to part of the relief they seek by having the court sell the farm conveyed by Lockridge to Barlows, but for the bar of laches. Section 2, chapter 74, as found in the edition of the Code of 1891, gives no limitation to a suit to set aside a preference. I know of no statute that does, operative at the date of the conveyance in question. This statute I consider eminently just, because it gives all just creditors, except lienors, an equal share, ratably, in the property of an insolvent debtor. Still, it is an innovation upon the antecedent law in the Virginias, and generally in this country, which allowed preference even by an insolvent. This statute is somewhat dangerous for business men. It will overturn many instances of transfer made in good faith in the every day transaction of honest business, where the transferee had no idea of insolvency. It overturns honest transactions. These consideration call loudly upon a court to say that those who would assail such a conveyance must not sleep upon their rights, but act promptly. Where actual fraud exists, the grantee may justly suffer the penalty of making amends after a long time; and even there I think there should be a statute of reasonable limitations, though the case be one of fraud, as things should sometimes have an end. But in the case of a deed not fraudulent, but void

simply because it is a preference of an honest debt, where the common law gave entire freedom of preference, I think parties should act with great promptness. They ought not to be allowed to delay in their assault upon a transaction free from moral taint. They ought not to be allowed to revolutionize things honestly done, and so bring disaster on others, after a long time, when the parties had gone on to make improvements and taken other steps on the faith of the validity of the transaction. There being no statute of limitations, it is simply a question of laches, in equity. What time shall be given? That depends on the circumstances of each case. The deed was put on record at once.—open to the world. Presumably, the parties interested lived in Pocahontas, and had knowledge or means of knowledge of the transaction. It will not do for the plaintiffs to say that the facts were peculiarly within the knowledge of the Barlows and Lockridge, because the plaintiffs are called on to glean information touching their rights by diligent inquiry and the adoption of means proper to that purpose, as all business people are. They could sue and call upon their adversaries for a discovery under oath. As said in *Lafferty* v. *Lafferty*, 42 W. Va. 792, (26 S. E. 265): "And the law is, where one has means of knowledge of a fraud, or sufficient notice to put him on inquiry, it is enough to count time against him. Kerr, Fraud. & M. 310. Where he has means of knowing or ascertaining, where he is put on inquiry, where ordinary prudence for his interests suggests that he inquire, he must do so, or else time runs. Opinion in *Thompson* v. *Iron Co.*, 41 W. Va. 574, (23 S. E. 795), and cases there cited. * * * The United States supreme court said: 'The defense of want of knowledge on the part of one charged with laches is one easily made, easy to prove by his own oath, hard to disprove; and hence the tendency of the courts in recent years has been to hold the plaintiff to a rigid compliance with the law which demands, not only that he should have been ignorant of the fraud, but that he should have used reasonable diligence to have informed himself of all the facts. Especially is this the case where the party complaining is a resident of the neighborhood in which the fraud is alleged to have taken place." *Foster* v. *Railroad*

Co., 146 U. S. 99, 13 Sup. Ct. 32, 36 L. Ed. 903. In the case of *Broderick's Will*, 21 Wall. 519, 22 L. Ed. 603, the same court said: 'They do not pretend that the facts of the fraud were shrouded in concealment, but their plea is that they lived in a remote and secluded region, far from means of information, and never heard. * * * Parties cannot thus, by their seclusion from means of information, claim exemption from the laws that control human affairs, and set up a right to open all transactions of the past. The world must move on, and those who claim an interest in persons or things must be charged with a knowledge of their status and condition, and of the vicissitudes to which they are subject.' " If such is the rule in cases of fraud in contracts, is there not more reason in calling for prompt action to overthrow a deed deemed honest in law, and only objectionable because of its preferential character? On this subject of laches, see *Pusey* v. *Gardner*, 21 W. Va. 470; *Trader* v. *Jarvis* 23 W. Va. 100; *Newcomb* v. *Brooks*, 16 W. Va. 32 (Syl., point 10). In *Williams* v. *Maxwell*, 45 W. Va. 297, (31 S. E. 909),—a case to set aside a sale for fraud,—JUDGE, MCWHORTER discusses the subject of laches quite elaborately; citing many authorities that enforce the duty of diligence upon him who would set aside a deed for fraud. But I repeat that the case of a mere preference, free from actual fraud, calls still more loudly for the requirement of a suit within a short time. This suit was delayed too long,—four years and four months. The *Williams Maxwell Case* said three years was too long. The public policy demanding, under this statute, speedy suit, is very plain; but I am the more inclined to come to the conclusion that this suit was delayed too long from the fact that the legislature, in chapter 4, Acts 1895, enforces this policy, by demanding that a suit to set aside a preference be brought within the short time of one year, and, if the deed be admitted to record within eight months, the suit must be brought within four months after such recordation. That statute does not retroact and apply to this case. *State* v. *Mines*, 38 W. Va. 125, (18 S. E. 470). But it calls upon us to enforce such policy by saying that this suit was too long delayed. Our conclusion is to re-

verse the decree and dismiss the bill. Costs against Andrew Herold, Witz, Beidler & Co., Gugenheimer & Co., and Armstrong, Cator & Co.

Reversed.

CHARLESTON.

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WARD v. WARD.

Submitted February 1, 1900—Decided April 7, 1900.

1. TRIAL—*Instructions—Facts Stated.*
When the court instructs the jury that if they believe, from the evidence, certain hypothetical facts mentioned in the instruction, they must find for the party plaintiff or defendant, as the case may be, but omits from such statement of facts a material fact, which being believed from the evidence, would require a different verdict, such instruction is erroneous, and, if excepted to, and not cured, is ground for reversal. (p. 768).

2. INSTRUCTION ERRONEOUS—*Presumption Prejudicial.*
An erroneous instruction on a material point is presumed to be to the prejudice of the party appealing against whom it is given, and will cause reversal, unless it clearly appears from the record that it was harmless. (p. 771).

3. INCONSISTENT INSTRUCTIONS—*Not Cured by Good One.*
Instructions must not be inconsistent with each other. A bad instruction is not cured by a good one, though they be given on the motion of adverse litigants. (p. 772).

4. SLANDER—*Utterance Privileged—Burden.*
The question as to whether the occasion on which the words were uttered in an action for slander was one of absolute or qualified privilege, is one for the court. If absolute, the defendant is entitled to judgment; if, however, the privilege was only qualified, the onus lies on the plaintiff of proving actual malice. (p. 772).

5. QUALIFIED PRIVILEGE—*Communication—Interest.*
A qualified privilege extends to all communications made *bona fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty to a person having corresponding interest or duty; and the privilege embraces cases where the duty is not a legal one, but where it is of a moral or social character of imperfect obligation. (p. 772).

6. DEFAMATION—*Parties Interested.*
In such a case the defendant may, under the general issue, show that the alleged defamation consisted in a communication made by or to persons interested in the subject-matter of the communications, although they affect the character or credit of the plaintiff. (p. 772).

Error to Circuit Court, Barbour County.

Action by Ira Ward against Taylor Ward. Judgment for plaintiff, and defendant brings error.

Reversed.

W. T. ICE and SAMUEL V. WOODS, for plaintiff in error.

DAYTON & DAYTON, M. PECK and F. O. BLUE, for defendant in error.

ENGLISH, JUDGE:

This was an action of trespass on the case, brought by Ira Ward against Taylor Ward, his brother, in the circuit court of Barbour County, on the 26th of December, 1896, claiming damages to the amount of twenty-five thousand dollars on account of certain defamatory words alleged to have been uttered by the defendant in regard to the plaintiff's pecuniary condition. The words alleged to have been uttered by the defendant, as set forth in plaintiff's declaration, are as follows: "That he (meaning plaintiff) was broke up (meaning that the plaintiff had become so involved financially as not to be able to continue as theretofore his business, and that he had become insolvent, and unable to pay his debts); that he (meaning plaintiff) was broke up, and could not pay his debts (meaning that plaintiff had become insolvent); that he (meaning plaintiff) was broken up worse than Joe Smith, and could never pay his debts (meaning that plaintiff had failed in business, become more insolvent than Joe Smith, and would never, by

reason of their magnitude, be able to pay his debts); that he (meaning plaintiff) was broke up (meaning that he had failed in business, and become insolvent), and he (meaning himself,—defendant) intended to put him (meaning plaintiff) in the road (thereby meaning that the defendant intended selling out by legal process the property, real and personal, of plaintiff, and, by depriving him of his home and property, require him to leave the same in abject poverty); that if he (meaning plaintiff) had known that the Bank of Buckhannon was going to get out that attachment (meaning a certain execution issued from the circuit court of Upshur County against Joseph Smith, Jane Smith, and plaintiff, as surety, for nine hundred and sixty-six dollars and sixty-eight cents, with interest from February 12, 1894, and fourteen dollars and one cent costs,) he (meaning plaintiff) would have put all his (meaning plaintiff's) property out of his (meaning plaintiff's) hands (thereby meaning and intending that, if plaintiff had known beforehand that said execution would issue, that he, plaintiff, would have fraudulently and corruptly disposed of his property for the purpose of cheating and defrauding said bank and his other creditors out of payment of their debts against him)." On the 4th of March, 1898, the defendant appeared, and pleaded not guilty, and issue was thereon joined. On June 3, 1898, the cause was submitted to a jury, and later resulted in a verdict for the plaintiff for seven thousand five hundred dollars damages. The defendant, by his counsel, moved the court to set aside the verdict, and grant a new trial, which motion was overruled, and judgment rendered upon the verdict. The defendant excepted, and took a bill of exceptions.

During the trial, the court at the instance of the plaintiff, gave the jury the following instructions: "No. 1. The court instructs the jury that slander is the defamation of a man with respect to his character, or his trade, profession, or occupation, and in this case has reference only to his trade and business, by word of mouth; and if they believe, from the evidence, that the defendant, Taylor Ward, uttered any or all of the slanderous words charged in the plaintiff's declaration, maliciously intending to damage the plaintiff, Ira Ward, in his trade, profession, or occupation,

and that said Ira Ward was damaged by said slanderous utterances from Taylor Ward, they should find for the plaintiff. No. 2. The court instructs the jury that if they believe, from the evidence, that the slanderous words, or any of them, charged in the plaintiff's declaration, were uttered by the defendant, Taylor Ward, against and about the plaintiff, Ira Ward, the law will presume that the said words were uttered maliciously, and with intent to injure the plaintiff, and the burden is on the defendant to show that the words were privileged; and if the jury further believe, from the evidence, that the defendant has failed to show that said words were privileged, then they should find for the plaintiff." "No. 6. The court instructs the jury that if they believe, from the evidence, that the defendant, Taylor Ward, spoke and published the slanderous words or any of them charged in the plaintiff's declaration mentioned in the manner and for the purpose charged therein against him, and that said slanderous words so spoken damaged the plaintiff in his trade or occupation, then they should find for the plaintiff; and the court further instructs the jury that they are the judges of the amount of damages to which the plaintiff would be entitled under the evidence." "No. 10. The court instructs the jury that if they believe, from the evidence, that the defendant, Taylor Ward, uttered the slanderous words, or any of them, as laid in the plaintiff's declaration, or any of them in response to private inquiries made of him concerning the plaintiff, such replies or answers made to such inquiries do not excuse the defendant from liability to the plaintiff, unless the jury believe, from the evidence, that the defendant, Taylor Ward, honestly believed in the truth of the said charges made by him at the time he made them, and unless the jury further believe from the evidence that his said charges were in direct response to the said injuries, and were not irrelevant information gratuitously volunteered on the part of the said Taylor Ward." All of these instructions were objected to by the defendant, the objection overruled, and the instructions given to the jury, the defendant excepting thereto.

Can we sustain the action of the court in giving to the jury said instruction No. 1? In it the court omits any ref-

erence to the question whether the utterances attributed to the defendant in the averments of the declaration were or were not privileged. A glance at the evidence shows that almost every witness who testifies to the fact that the plaintiff was broken up, or would be unable to meet his liabilities, was a creditor of the plaintiff, and was in a confidential manner consulting with the defendant, also a large creditor, in reference to the solvency of his brother, the plaintiff. Under the head of "Libel and Slander," 13 Am. & Eng. Enc. Law, p. 429, we find the law thus stated: "Although evidence tending to prove the truth of the words spoken is inadmissible under the plea of not guilty, yet facts which induced the mistaken belief in the mind of the defendant that the charge was well grounded are admissible to rebut malice. The judge must decide whether the occasion is or is not privileged, and also whether such privilege is absolute or qualified. If he decide that the occasion was one of absolute privilege, the defendant is entitled to a judgment, however maliciously and treacherously he may have acted. If, however, the privilege was only qualified, the *onus* lies on the plaintiff of proving actual malice." Turning to the testimony of Crim, it appears that this witness for the plaintiff was president of the Tygarts Valley Bank; that the defendant was security for the plaintiff on a note at the Grafton Bank, and came into Crim's office at the bank several times to see it the note had been paid, and they consulted together as to plaintiff's liabilities, and ascertained them to be twenty-eight thousand dollars to thirty thousand dollars, and that is the way the conversation occurred. The bank was interested in knowing the plaintiff's pecuniary condition, and the defendant was a creditor, and this was surely a privileged communication. Newell, in his work on Slander (page 389), in speaking of qualified privilege, says: "It extends to all communication made *bona fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty to a person having a corresponding interest or duty; and the privilege embraces cases where the duty is not a legal one, but where it is a moral or social character of imperfect obligation;" citing many authorities. Other parties, relatives

of the defendant, who had business relations with the plaintiff, and to whom he was indebted, held confidential communications with the defendant as to the solvency of plaintiff, and, if such communications are not to be legally and properly classed as privileged, a signal check will be given to those confidential business relations in every day's transaction which tend so largely to promote the prosperity of the State. The first ands ixth instructions, above quoted, single out certain facts which the evidence may have a tendency to prove, and omit the facts so prominently shown that the words uttered, from the circumstances immediately attending their utterance, might well be considered and believed by the court and jury to be privileged communications. In the case of *Woodell* v. *Improvement Co.*, 38 W. Va. 23, (17 S. E. 386), this Court held that "when the court instructs the jury that if they believe, from the evidence, certain hypothetical facts mentioned in the instructions, they must find for the party plaintiff or defendant, as the case may be, but omits from such statement of facts a material fact, which, being believed from the evidence, would require a different verdict, such instruction is erroneous, and, if excepted to and not cured, is ground for reversal." And in *Osborne* v. *Francis*, 38 W. Va. 312, (18 S. E. 591), it was held that "an erroneous instruction on a material point is presumed to be to the prejudice of the party appealing against whom it is given, and will cause reversal unless it clearly appears from the record that it was harmless." In the case under consideration, the fact that the words claimed to have been slanderous were privileged communications was strongly relied on by the defendant. In *McCreery's Adm'x* v. *Railroad Co.*, 43 W. Va. 110, (27 S. E. 327), it was held that: "When contributory negligence is relied on in defense of an action for wrongful injury or death, a hypothetical instruction directing a finding in favor of plaintiff, which omits any reference to the facts tending to establish contributory negligence, and entirely ignores such defense, is erroneous. Nor can such error be cured by other instructions given in behalf of either party." As to this last proposition, see *McKelvey* v. *Railway Co.*, 35 W. Va. 501, (14 S. E. 261), where it is held that instructions must not be inconsistent

with each other, and that a bad instruction is not cured by a good one, though they be given on the motion of adverse litigants. "The bad instruction, should be with drawn." As to hypothetical instructions, see *Industrial Co.* v. *Shultz*, 43 W. Va. 471, (27 S. E. 255).

Instruction No. 2 is erroneous in that it tells the jury that "if they believe, from the evidence, that the defendant has failed to show that said words were privileged, then they should find for the plaintiff. The error consists in the fact that the question as to whether the words uttered were privileged was not a question for the jury, but was one of law for the court upon the facts proven. See quotation above given from 13 Am. & Eng. Enc. Law, p. 429. The utterance in the case at bar comes within the purview of what the law considers a qualified priviledge. Newell. Defam. p. 389. The *onus* lies on the plaintiff of proving actual malice, and the court erred in telling the jury, in instruction No. 2, that "if they believed, from the evidence, that the slanderous words, or any of them, charged in plaintiff's declaration, were uttered by the defendant against or about the plaintiff, the law will presume that the said words were uttered maliciously, and with intent to injure the plaintiff," without at the same time telling them that said presumption would be overthrown if the circumstances showed that the utterances were privileged, and in such case the *onus* of proving malice would be upon the plaintiff.

Instruction No. 6 is erroneous in that it fails to inform the jury as to the result of the words charged in the declaration to have been uttered were privileged. Whenever, in answering an inquiry, the defendant is acting *bona fide* in the discharge of any legal, moral, or social duty, his answer will be privileged. *Id.* p. 494, § 88. The defendant may, under the general issue, show that the alleged defamation consisted in a communication on matters of business made by or to persons interested in the subject-matter of the communications, although they affect the character or credit of the plaintiff. *Id.* p. 788. Greenleaf on Evidence (volume 2, § 421), under "Defense under the General Issue," says: "So, if a person having information materially affecting the interests of another, hon-

estly communicates it privately to such other party in the full and reasonably grounded belief that it is true, he is justified in so publishing it, though he has no personal interest in the matter, and though no inquiry has been made of him, and though the danger to the other party is not imminent."

Having reached the conclusion that instructions Nos. 1, 2, and 6, for the above reasons, were erroneous, and should not have been given to the jury, I consider it unnecessary to discuss the testimony, or the questions raised by the action of the court in overruling the motion to set aside the verdict. The judgment is reversed, the verdict set aside, and a new trial awarded.

Reversed.

CHARLESTON.

HOLLANDSWORTH v. STONE *et al.*

Submitted January 18, 1900——Decided April 7, 1900.

1. SERVICE OF SUMMONS—*Person—Officer.*
   Any credible person may serve a summons or other process, or legal notice, and make verified return of such service, though there has not been any prior return of not executed by an authorized officer. (pp. 774-775).

2. EVIDENCE—*Demurrer—Burden of Proof.*
   Either party in an action at law may, of right, demur to the evidence of his adversary, when that adversary carries the burden of proof, unless the case be clearly against the demurrant, or the court entertains a reasonable doubt as to what facts should be fairly inferred from the evidence. (p 766.)

3. DEMURRER TO EVIDENCE—*Joinder—Objection.*
   One who objects to being compelled to join in a demurrer

to evidence must make his objection thereto in the circuit court, and cannot make it for the first time in the supreme court. (p. 778-779).

Error to Circuit Court, Lincoln County.

Action by J. M. Hollandsworth against George W. Stone and others. Judgment for plaintiff, and defendants bring error.

Affirmed.

LACE MARCUM, J. R. WILSON and D. E. WILKINSON, for plaintiffs in error.

CAMPBELL & MAY, for defendant in error.

BRANNON, JUDGE:

This is an action of debt in the circuit court of Lincoln County, by J. M. Hollandsworth against George W. Stone and others upon a penal bond given to Hollandsworth by Stone and others, with condition that Stone, as deputy of Hollandsworth, sheriff of Lincoln County, would faithfully discharge his duties as such deputy, and pay over and account for, as required by law, all moneys that should come to Stone's hands by virtue of his office of deputy sheriff. Upon the trial the plaintiff demurred to the evidence of the defendant, and the court gave judgment for the plaintiff upon such demurrer to evidence, and the defendants have brought the case to this Court by writ of error.

1. The summons in the action having been served by a private individual, the defendants moved the court to quash the return of service because the service was made by a private individual without the original writ having been first returned "Not executed" by an officer. This motion is rested on the theory that section 2, chapter 124, Code 1891, provides that "process to commence suits, including writs of *scire facias*, *mandamus*, *quo warranto*, *certiorari*, prohibition and the alias or other process, where the original is returned not executed, may also be served by any credible person." It is claimed that, as this summons showed no return of not executed, the return of service by an individual, verified by his affidavit, is absolutely void. If this Court holds that doctrine, it would upturn how many

judgments and decrees in West Virginia? It would reverse the practice prevalent throughout this State for fifty years. As far back as the Code of 1849, chapter 170, section 6, it was provided that "any summons or *scirs facias* may be served as a notice is served under the first section of chapter 167," and that provides that "any sheriff or sergeant shall serve a notice, * * * and make return. * * * Such return, or a similar return by any other person who verifies it by affidavit, shall be evidence of the manner and time of service." This provision has ever since continued the law. Code, chapter 124, section 6, and chapter 121, section 1. Under it such long practice of serving process by individuals has prevailed. It would be a total reversal of this practice to hold now as we are asked to hold, and it would nullify the plain meaning of the statutes cited, made for remedial purposes, and for public convenience in the service of process. But there is no clash between the statutory provisions above quoted. The construction of section 2, chapter 124, contended for by counsel for Stone, is not sound. The words "not executed" do not refer to the process to commence suits, but only to the words "other process." They are simply descriptive of "other process." The lawmaker, fearing that it might be contended that further process after the original might be required to go to the same officer, expressly provided for its service by a private individual, just like other process. It was meant to say that not only original process might be served by an individual, but also alias or any other process, whatever its proper name,—"pluries" or other, —where the prior process had been returned unexecuted, might be served by an individual, just like the other process mentioned in the section. This construction harmonizes all these provisions. Where is the reason in requiring that, before an individual shall serve process, there shall be a return of not executed by an officer? *Peck* v. *Chambers*, 44 W. Va. 270, (28 S. E. 706), does not bear on this point. The point in that case was whether an individual serving process must be a credible person; and the case does not discuss the point we have in hand, and was not meant to sustain the construction of section 2, chapter 124, contended for.

2. It is argued that the court erred in requiring defendants to join in the demurrer to evidence. The court did not do so. The defendants did not object to joining in such demurrer. So far as the record discloses, they willingly did so. But, if there had been an objection, the court would have been bound to compel such joinder, because, the plaintiff having shown enough to sustain his action and cast the burden of defense on the defendants, the plaintiff had a right to compel the defendants to join in the evidence. This will appear from principles stated in the opinion by JUDGE MCWHORTER (this term) in *Bennett* v. *Perkins*, (W. Va.) 35 S. E. 8. *Bank* v. *Evans*, 9 W. Va. 373, holds that "the defendant ought to be compelled to join in a demurrer to evidence, when the burden of proof is upon him, unless the case is clearly against the plaintiff, or the court doubts what facts should be reasonably inferred from the evidence." *Shaw* v. *County Court*, 30 W. Va. 488, (4 S. E. 439), holds that "either party may demur to the evidence, unless the case be clearly against demurrant, or the court has reasonable doubt as to what facts should be fairly inferred from the evidence."

3. The evidence shows that Hollandsworth, as sheriff, transacted the business in certain districts, and Stone in other districts, of Lincoln County, and that Hollandsworth paid certain drafts or orders against the boards of education of districts in which Stone was collecting taxes, and Hollandsworth delivered them to Stone, to be presented to the boards of education to the credit of the sheriff, in settlement with them, and for them Stone gave to Hollandsworth "duebills." Afterwards, when they met at the sheriff's office, where the book of account between the sheriff and his deputy was kept, they would have the clerk sum up these duebills, and charge them to Stone in the account in the book between Hollandsworth and Stone, and then they burned the duebills. Also, sometimes Hollandsworth took up for Stone a few of his mere private or personal duebills, which had been given by Stone to people holding public orders, and which Stone paid partly in cash and partly in such duebills, in lieu of cash. These last-named duebills were also likely charged to Stone, in favor of Hollandsworth, in the book containing the account be-

tween them. These due bills amounted to eight hundred and ninety-nine dollars and ninety-nine cents. The defendants assign it as error that the court did not allow them as a credit for that eight hundred and ninety-nine dollars and ninety-nine cents. They say that those duebills were the mere private debts of Stone, and that the defendants who are sureties in Stone's bond are not responsible therefor, because of the unquestionable legal principle stated in *State* v. *Nutter*, 44 W. Va. 385, (30 S. E. 67), that "sureties stand on the letter of their contract, which is not to be extended by mere implication," and that the law regards them with tenderness, and binds them no further than the contract which they have signed calls for. The same principle is stated by JUDGE DENT, in *State* v. *Enslow*, 41 W. Va. 744, (24 S. E. 679). If it were true that those duebills were charged in this suit to the defendants, I would regard the position taken by them tenable. But they were not charged. The evidence of Hollandsworth distinctly states and shows this, and Stone, on the witness stand, does not assert the contrary. But look at the record. Those duebills are not incorporated in the evidence. Hollandsworth's evidence distinctly shows what items he charged to the defendants on the trial of the case, and these duebills are not among them; and those items given in evidence on the trial, abating the credits allowed by Hollandsworth, leave one thousand six hundred and eighty dollars and eighty-six cents, the amount of indebtedness found by the jury in their conditional verdict. Now, if those duebills are not included in the amounts or items given in evidence as charges on the trial, how can we say that they are charged to Stone? It was Hollandsworth who showed the credits in favor of the defendants, not the defendants. Hollandsworth charged Stone with the taxes of various kinds committed to his hands for collection, and collections from delinquent sales and fines collected; giving specifications, which do not include these duebills. He then gave credits, and the result was the sum found by the jury. The defense seems not to have denied the items of this account. If we see that it is not a debit against Stone, it is not included in the finding. Remember that, although those duebills were charged in the private account

between Hollandsworth and Stone in that book, they were not put in evidence on the trial. That book had nothing to do with the trial. They were not included in the credits, and should not have been, because they were paid out of the pocket of Hollandsworth, and not by Stone. The orders for which those due bills were given were only handed to Stone by Hollandsworth in order that Stone, who was to make settlement with the boards of education of his districts, might present them in settlement with the boards of education to the credit of the sheriff; and, as Hollandsworth had paid them, he took those duebills from Stone as mere memoranda to show that he had furnished so much credit in such settlement, as Hollandsworth required Stone to make settlements with the boards of education, and, in settlement with Stone, went by the results of the settlements with the boards of education, and was entitled to charge Stone, as an individual, with those duebills. The point we have to determine is whether on the trial those duebills were charged to Stone and the other defendants, and we say from the record that they were not; and very clearly they are not among the items of charge made by Hollandsworth in the evidence given by him on the trial, shown by the stenographic report, which contains the specific items charged to the defendants. Therefore we find no error in the refusal of the court to hold that the defendants were entitled to the said sum of eight hundred and ninety-nine dollars and ninety-nine cents as a credit.

4. The defendants claim that evidence in the case shows that some of the defendants, sureties of Stone, inquired of Hollandsworth at different times as to Stone's settlements, and whether or not he was falling behind, and that Hollandsworth replied that Stone was coming up all right and was keeping square with him; and the defendants claim that they were kept in ignorance of Stone's default, and lulled to sleep, by Hollandsworth's declarations, and thus kept from taking steps to save themselves, which otherwise they would have taken. We express no opinion upon this matter. There is no plea setting up that estoppel *in pais*, but, if there were a good plea, relief on that score, if the defendants are entitled to any relief, must be had from

a court of equity, and cannot be given at law. *Poling v. Maddox*, 41 W. Va. 779 (24 S. E. 999), (Syl., point 7); *Bank v. Parsons*, 42 W. Va. 137, (24 S. E. 554), (Syl., point 9); *Glen v. Morgan*, 23 W. Va. 467. Therefore we affirm the judgment, without prejudice to the defendants to any relief they may be entitled to on the score of said estoppel in equity.

Affirmed

CHARLESTON.

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STANTON-BELMENT CO. *v.* CASE *et al.*

Submitted January 24, 1900.—Decided April 7, 1900.

1. JUSTICE SUMMONS—*District—Jurisdiction.*
   A justice cannot issue a summons to a defendant to appear before him at a place, named, without his own district. (p. 784).
2. JUDGMENT VOID.
   A judgment by default rendered by such justice upon such summons is void. (p. 784).
3. PROCESS—*Service—Return—Presumption.*
   Where the return of service of process by an officer is not dated, the presumption is that the service was made within the time prescribed by law. (p. 781).

Error to Circuit Court, Fayette County.

Action by the Stanton-Belment Company against E. N. Case, Samuel L. Carter, and others. Judgment for plaintiff, and defendants bring error.

Affirmed.

C. W. DILLON, for plaintiffs in error.

WATTS, OSENTON & ASHBY, for defendant in error.

McWHORTER, PRESIDENT:

The Stanton-Belment Company, a corporation, brought its action of *assumpsit* against Samuel L. Carter, E. N. Case and E. S. Dickinson in the circuit court of Fayette County. The writ was issued on the 26th day of March, 1898, and was returned by the sheriff indorsed, "Executed April 1st on E. S. Dickinson and E. N. Case, by delivering to each of them an office copy of the within; they, and each of them, being found in Fayette County. Geo. W. McVey, S. F. C." And service was accepted by defendant Carter. On the 20th day of May, 1898, the defendants, by counsel, appeared specially, and moved the court to quash the summons and the return thereon, which motion was overruled, and defendants excepted; and the defendants demurred to plaintiff's declaration, and to each count thereof, which was also overruled, and defendants excepted; and defendants tendered a special plea in writing, which was filed and plaintiff replied generally thereto. Said special plea was to the effect that plaintiff had brought and prosecuted a suit against the same defendants before D. Tamplin, a justice of the peace of said county, then and there having jurisdiction of the cause, which was begun on the 3d day of February, 1898, the cause of action being upon a note,—the same which is filed as the basis of this action,—and on the 19th day of February, 1898, the said justice rendered judgment upon the said note in favor of plaintiff and against the said E. N. Case, Samuel L. Carter and E. S. Dickinson for the sum of one hundred and forty-eight dollars and seventeen cents and the costs of plaintiff in that behalf, whereof said defendants were convicted, as by the record of said justice, still remaining upon his docket, more fully appeared, and which said judgment still remained in force, which they were ready to verify by the said record, etc.; and the case was submitted to the court, in lieu of a jury, and in support of their said special plea said defendants introduce the certified transcript of the justice's docket, and the plaintiff introduced C. W. Osenton, who proved that, at the time of the issuing of the summons and rendering the judgment set up in said plea, the justice, D. Tamplin, was a justice

of Falls district, in Fayette county, and that the summons was made returnable before him in another district, to wit, at his office, in Kanawha district, in said county, and judgment thereon rendered on the 19th day of February, 1898, by default, which evidence the defendants moved the court to exclude, and not to consider, which was overruled, and defendants excepted; and the plaintiff tendered in evidence the note sued upon, dated March 27, 1897, for the sum of one hundred and thirty-seven dollars and twenty cents, to the introduction of which defendants objected. The objection was overruled, and the note considered in evidence, to which defendants excepted, and the court rendered judgment for plaintiff for one hundred and forty-two dollars and sixty-eight cents. Defendants filed four bills of exceptions (Nos. 1, 2, 3, and 4), which were signed, sealed, and saved to them, and the court certified all the evidence.

Defendants obtained a writ of error, and say that the court erred in refusing to quash the summons and return, as set out in bill of exceptions No. 1. There is no defect pointed out in the summons itself, and it seems to be in proper form. It is contended that the return has no sufficient date as to the service; simply saying, "Executed April 1st," without giving the year in which it was served. The writ bears date March 26, 1898, and is returnable on the first Monday in April next. This must be April, 1898. The motion to quash was made in the following May, so that it must, of necessity, have been served on the 1st day of April between the date of the paper served and the date of the appearance. Any other April would be impossible. In *Reid* v. *Jordan*, 56 Ga. 282 (Syl., point 1), it is held, "When the return of service by an officer is not dated, the presumption is that service was perfected within the time prescribed by law." Alder. Jud. Writs, pp. 532, 538. The return is also complained of as not being sufficient because it does not say a true copy of the writ was served on each of the defendants named,—that "an office copy of the within" does not indicate whether the "office copy" is from the clerk's office or from the sheriff's office. According to my observation, the practice of sheriffs is almost universal to use the phrase "office copy," when the

copy is furnished from the office of the clerk who issued the writ, but a return of the sheriff that he served the process by delivering a copy thereof to the defendant in person is sufficient.

It is also claimed, as per bill of exceptions No. 2, that the court erred in not sustaining the demurrer to the declaration, in that the note sued upon was made payable at "Charleston National Bank"; that the declaration alleges that it was presented for payment at Charleston National Bank, but does not allege that it was the Charleston National Bank of Charleston, West Virginia, and that this was the bank and place where the note was intended to be presented; that it might have been payable at the Charleston National Bank of Charleston, S. C., or in some other State. The note was payable at the Charleston National Bank,—the only one of the name in the State, or in all this region of country,—and was there presented for payment, and protested for nonpayment, and this the declaration avers; and if it was presented at the wrong bank, and protested at the wrong place, this could be shown in defense, and would be a good defense as to the indorsers.

It is said that the court erred in hearing and considering the testimony of C. W. Osenton, and permitting the note to be read in evidence over the objection of defendants, and in finding for the plaintiff upon the plea of *res judicata*, filed in the case, as set out in bill of exceptions No. 3. The objection to the introduction of the note was that, according to the printed record, the note offered was indorsed on its face by the protesting notary, "Protested for nonpayment July 28, 1897," while the declaration alleges that the note sued upon was protested on the 28th of June, 1897, showing clearly a variance between the *allegata* and *probata* and the note should have been excluded. While the printed record shows the date July 28th, the manuscript shows it June 28th, showing that it was simply an error in printing the record; and, further, in the copy of the note set out in the certificate of evidence it shows, written across the face of it, and signed by the notary, "Protested for nonpayment June 28, 1897."

In support of the plea of *res adjudicata*, the defendants introduced the record of the judgment before the justice,

rendered upon the same note sued upon here. This transcript shows: That suit was brought by issuing summons on the 3d of February, 1898, returnable on February 12th. Returned duly executed, as shown by return indorsed by constable. Case continued after waiting one hour, and, defendants not appearing, the justice, by agreement with plaintiff's attorney, continued the action seven days, until the 19th day of February, at 11 o'clock a. m., at which time, none of the defendants appearing, after waiting one hour (the defendants still failing to appear, and the plaintiff demanding a trial of the case) the case was tried by the justice, and judgment in favor of the plaintiff for amount of the note and costs. That on the 20th of February execution was issued and placed in the hands of a constable for collection, and made returnable within sixty days from its date. On the 26th of March, on motion of plaintiff's attorney the said execution was recalled by the justice and quashed, the judgment set aside, and the case dismissed. The plaintiff introduced as a witness C. W. Osenton, and proved by him that Justice Tamplin was at the time of issuing the summons and the rendering of the said judgment referred to in defendant's special plea a justice of Falls district, and that the summons in the case, issued by him, was made returnable before him in another district, to wit, "at my office in Kanawha district of said county," and judgment there rendered on the 19th day of February, 1898, by default, which evidence the defendants moved the court to exclude and not consider, which was overruled by the court, and exception taken, as set out in bill of exceptions No. 3. The question is whether the judgment of the justice was void, and, if not, was it within the authority of the justice to set it aside more than a month after its rendition? Section 115, chapter 50, Code, is the only provision I see in the statute for a justice setting aside a valid judgment rendered by himself. That must be after reasonable notice to the opposite party, unless he, his agent or attorney, is present, when the motion is made, and then it must be done within two weeks after the judgment is entered. It is claimed by plaintiff that the judgment of the justice in his favor was without jurisdiction and void. Section 1, *Id.*, says, "The civil jurisdic-

tion of a justice of the peace shall extend throughout the county in which the district is for which he was elected." While a justice's jurisdiction for general purposes (administering oaths, and taking acknowledgments, depositions, affidavits, etc.) is co-extensive with his county, as provided in the first several sections of said chapter, there are only two cases in which they may exercise judicial functions without their districts. Under section 2 he may issue a summons requiring the defendant to appear before the justice of another district in the same county, if the suit be cognizable by the latter; and under section 3 he may be called to exercise the powers of a justice when the resident justice is under disability to act in a case before him. He may send his summons to any part of his county, requiring the defendant to appear before him at his office in the district of his residence, as provided in section 26 of said chapter 50; but by section 2 he is clearly inhibited, by implication, from making his summons returnable before himself without his district, and he would not be competent to try a case on such a summons. The statute means to protect to that extent, at least, the rights of the justices elected in their respective districts. The object in electing justices for the several districts is for the convenience of the people,—to bring justice to their doors, and that they may not, without good reason, be compelled to go to a remote part of the county to defend their rights in suits that may be brought against them. The judicial powers of a justice are purely statutory, and he cannot go beyond the limits there prescribed. If the legislature had intended to allow him to try cases in any district in his county on his own summons, he would not have been restricted as in section 2, when issuing a summons returnable without his own district,—that it should be for appearance of the defendant before the justice of the district in which the summons was returnable. Being so issued, the justice issuing it might, under section 3, aferwards be called to try the case. The testimony of C. W. Osenton was competent to prove the resident district of Justice Tamplin, and also the district in which the place of trial and return of the summons were located. The transcript of the justice's docket shows that the summons was

"made returnable at my office in the town of Montgomery," and it was competent to show by oral testimony in what district the town of Montgomery is located. The witness states that Justice Tamplin was a justice of Falls district, Fayette County, and that the summons was returnable before him in Kanawha district. The justice not having the legal right to try the matter in difference, and to enter up the judgment of February 19, 1898, the plea of *res adjudicata* was not sustained. The judgment is affirmed.

Affirmed.

CHARLESTON.

BILLINGSLEA *v.* MANEAR *et al.*

Submitted January 30, 1900.—Decided April 7, 1900.

1. BILL—*Demurrer—Rule to Answer.*
   When a demurrer to an original or amended bill is overruled, the defendant is entitled to a rule to answer the bill, which need not be served. (p. 786).

2. BILL—*Demurrer—Day to Answer.*
   Where a demurrer to a bill in equity is overruled, and no day is given the defendant in which to answer, the court cannot properly order a reference of the cause to a commissioner to ascertain the amount of the plaintiff's demand, where the object of the bill to subject land to sale is to ascertain the liens thereon and their priorities. (p. 787).

Appeal from Circuit Court, Marion County.

Bill by Morgan Billingsley against A. R. Manear and others. Decree for plaintiff, and defendant, Fanny Manear appeals.

Reversed.

HAYMOND, BUTCHER & HARTLEY, for appellant.

W. S. MERIDITH, for appellee.

ENGLISH, JUDGE:

This is the second time this cause has been brought before this Court for consideration. On the 9th of April, 1898, the demurrer interposed to the plaintiff's bill was sustained in part, and the cause remanded to the circuit court, with leave to amend. After the mandate had been entered in the circuit court, the cause was remanded to rules, with leave to file an amended bill therein, which was accordingly done. On the 8th of December, 1898, the defendant, Fanny Manear, filed her demurrer to the plaintiff's second amended bill filed at the October rules, 1898, in which demurrer the plaintiff joined; and the demurrer, after argument by counsel and consideration by the court, was overruled,and, without giving the defendants a rule to answer, or specifying a day in the order on which the defendants might appear and answer, the court referred the cause to a commissioner in chancery to ascertain what real estate was owned by Fanny Manear, where situate, and by what title held; all the liens and charges thereon, the orders of their priorities, and to whom owing; what improvements, if any, the defendant, A. R. Manear, has put or caused to be put on the real estate known as "Lot No. 19," situated in the town of Fairmont; how much, if any, such improvements have enhanced the value of said lot 19; what debts A. R. Manear owed before he made such improvements, to whom he owed the same, and when he contracted them. Now, the matters referred to the commissioner by this decree, would no doubt, be proper, if the allegations contained in this second amended bill were sustained by proof, or the bill taken for confessed, but by this decree no rule was given the defendants to plead, or day fixed on which they might answer, as required by section 30 of chapter 139 of the Code. That it was not the intention of the appellant, Fanny Manear, to allow this decree to go by default, is apparent from the fact that in her answers the original and amended bills filed by plaintiff she contests every claim therein asserted; yet, without giving the appellant a day in which to answer, the matters referred to said commissioner were ascertained and reported,the liens on said lot and their priorities ascertained,

the report confirmed, and a decree rendered directing the sale of said lot No. 19. The appellant claims that the court erred in referring said cause to a commissioner in chancery without giving petitioner a day to answer, after overruling her demurrer to the second amended bill. Counsel for the appellee relies on the ruling and the case of *Foley* v. *Ruley*, 43 W. Va. 513, (27 S. E. 268), which holds that: "When a demurrer to a bill is overruled, a time reasonable under the circumstances of the case must be given for answer; but, when a time is fixed, objection to its shortness must be made, else the point is waived. A mere order of reference, deciding nothing, may be made without such answer." In that case, however, a day was given the defendant in which to file his answer. BRANNON, JUDGE, speaking for the Court, said: "The fourth point made against the decree is that the court overruled the demurrer on one day, and required the defendants to answer on the next. I should say this was an unreasonably short time, as a general thing, but the defendants did not ask longer time, and did not ask a continuance; and there is nothing in this point, because the decree entered at that term was only an order of reference, not a decree on the merits, decided nothing, and the defendants had until the next term to file their answers, and did then file them." This case is easily distinguished from the one at bar. In *Foley* v. *Ruley* a day was given the defendants in which to answer; here no time was fixed for such answer. The same decree which overruled the demurrer directed the account, the determination of which involved to a great extent the merits of the case; the main controversy being as to the liens on said lot 19, and their priority and the improvements put upon it by A. R. Manear, the proper ascertainment of which necessarily involved expense, some of which might have been avoided by a proper answer of the defendant. A number of decisions of this Court have established the rule of practice that a defendant is entitled to a day in which to answer when his demurrer to the bill is overruled. See *Hays* v. *Heatherly*, 36 W. Va. 613 (15 S. E. 223), where it is held that: "On overruling the demurrer in such a case, the court should not at once decree against the defendant as upon a bill taken

for confessed, but should award a rule to answer, which rule, however, need not be served." So, in *Neeley* v. *Jones*, 16 W. Va. 626, it is held: "If a court overrules a demurrer to a bill, and gives the defendant a certain time in which to answer the bill, it cannot properly order a reference of the cause to a commissioner to ascertain the amount of the plaintiff's demand till the time has elapsed which was given the defendant to answer; nor can it then order such reference if the answer is filed, and denies all the facts on which the plaintiff's claim is based. If such answer be filed, no such reference can properly be made till the plaintiff, by evidence, has proven that he has a demand against the defendant." See, also, *Pecks* v. *Chamber*, 8 W. Va. 210; *Nichols* v. *Nichols' Heirs*, *Id.* 175; *Park* v. *Petroleum Co.*, 25 W. Va. 109; and the recent case of *Goff* v. *McBee*, (not vet officially reported) 34 S. E. 745, which holds that: "If the court overrules a demurrer to a bill, and gives the defendant a certain time in which to answer the bill, it cannot properly order a reference of the case to a commissioner to ascertain the amount of the plaintiff's demand till the time has elapsed which was given the defendant to answer; nor can it then order such reference if the answer is filed, and denies all the facts in which the plaintiff's claim is based. If such answer be filed, no such reference can properly be made till the plaintiff, bv evidence, has proven that he has a demand against the defendant." In that case the defendant was allowed thirty days to answer, and in his answer denied all the material allegations of the bill; yet on the day the answer was filed the court directed a sale of the land. From these rulings I conclude that the practice is well established that upon the overruling of a demurrer the defendant is entitled to a rule to answer, and that the court cannot properly order a reference of the cause to a commissioner to ascertain the amount of the plaintiff's demand, the real estate owned by the defendant, the liens thereon, and their priorities, until the time has elapsed given the defendant to answer. The decree must be reversed, and the cause remanded.

Reversed. Remanded.

CHARLESTON.

STATE v. MITCHELL.

Submited January 27, 1900.—Decided April 7, 1900.

1. POLLUTING WATER COURSE—*Offense—Sawdust.*

Casting sawdust into a brook from the operation of a sawmill does not constitute an offense under section 20*b*, chapter 150, Code 1891. (p. 791).

2. INDICTMENT—*Sufficiency Of.*

Though generally sufficient to charge in an indictment an offense in the words of a statute, yet if this does not sufficiently define the particular wrongful act, and give notice to the defendant of the offense he is required to meet,—the particular criminal act in its eesentials—the statute words must be expanded by such specification of the essentials as will define the offense with particularity. (p. 792).

Error to Circuit Court, Braxton County.

T. M. Mitchell was convicted of polluting a water course, and brings error.

Reversed.

JAMES E. CUTLIP, for plaintiff in error.

ATT'Y GEN. EDGAR P. RUCKER and D. J. F. STROTHER, for the State.

BRANNON, JUDGE:

Mitchell was fined by the circuit court of Braxton County and brings his case to this Court. The indictment charges that he "did knowingly, willfully, and unlawfully throw and cause to be thrown into a certain brook and branch of running water (describing the brook or branch), the said brook and branch then and there being used for domestic purposes, putrid, nauseous, and offensive substance, to wit, sawdust, and the offal and refuse from a certain sawmill, and other putrid, nauseous, and offensive substance." Should the demurrer to the indictment have been sustained? Does it charge an indictable

offense? Is sawdust a putrid, nauseous, or offensive substance? The indictment alleges that it is, and therefore it may be said that, on demurrer, it ought to be taken to be so; but if we can, by judicial notice, say that it is not so, the allegation that it is will not make it so. "If a fact which the court will take judicial notice of be erroneously pleaded, a demurrer does not admit such erroneous statement of fact, but the party filing the demurrer will be entitled to the advantage of the fact, as the court will judicially notice it." 11 Am. & Eng. Enc. Law (2d Ed.) 489, note 4. We know that sawdust is a clean substance, coming from the sawing of logs, not putrid, not nauseous, not offensive, even when it has become somewhat decayed, lying in large quantity. The indictment says it is otherwise, but our common knowledge of it denies this. "Courts will understand words in general use in the same sense in which they are usually understood by masses of men, and no allegation or proof of such meaning is necessary." *Edwards* v. *Society*, (Cal.) 34 Pac. 128, 37 Am. St. Rep. 70. "In fact, in the case of phrases, and words, too, the criterion is, as it is everywhere throughout this subject of judicial notice, common knowledge or general notoriety." "Courts will judicially take notice, without proof, of whatever ought to be generally known, within the limits of their jurisdiction." *Lanfear* v. *Mestier*, 89 Am. Dec. 658, and note, 692. If an indictment charge that one, without license, sold water or oil, charging it to be intoxicating, I take it that a court would say it was not intoxicating, and would not go through a trial to hear evidence on the subject. The statute on which this prosecution rests is found in Code 1891, chapter 150, section 20*b*: "If any person shall knowingly and willfully throw or cause to be thrown into any well, cistern, spring, brook or branch of running water which is used for domestic purposes, any dead animal carcass, or part thereof, or any putrid, nauseous or offensive substance, he shall be guilty of a misdemeanor, and upon conviction thereof, shall be fined not less than five dollars nor more than one hundred dollars, and may, at the discretion of the jury, be confined in jail not exceeding ninety days." This statute prohibits the casting into a well, cistern, spring, or

brook used for domestic purposes any dead animal, or putrid, nauseous, or offensive substance. The mention of dead animal and carcass indicates the general nature or kind of the thing deposited that was in the mind of the lawmaker. I think it was meant to prohibit such things of that general character as vitiate or render nauseous or offensive water used by human beings, not a thing like sawdust, which merely discolors water, and imparts to it a woody taste, but does not certainly make it nauseous and offensive. The words "dead body" and "carcass" are specified, and it is a rule of very considerable force in the construction of statutes that, "when there are general words following particular and specific words, the former must be confined to things of the same kind." Suth. St. Const. § 268. It may be asked, would not the deposit of sawdust in a spring or well be a wrongful act? It would, and would sustain a civil action; but it is no crime. Observe, the statute does not say that everything and anything that will to any extent deteriorate or vitiate water used for domestic purposes, cast therein, will be indictable. It only says that it shall be indictable to cast in water those substances that are in themselves putrid, nauseous, or offensive. They must have that essential quality. It is clearly the subject of a civil action for one riparian owner to put sawdust into a stream so that it passes and lodges upon the land of a lower riparian owner, or discolors the water so that it is unfit for domestic use, including the watering of stock. Such other riparian owner may prevent it by injunction. A number of authorities hold that the party may, in the use of a mill in a reasonable manner, discharge sawdust and waste into the stream in the ordinary course of using his mill, and that he is not bound to prevent them from going into the stream. 28 Am. & Eng. Enc. Law, (1st Ed.) 974, note; Gould, Waters, 433; Ang. Water Courses, section 140d. But the authorities seem to me, on the whole, to sustain the position that a riparian owner, who, by casting sawdust into a stream, injures one lower down the stream,—substantially injures him,—can be enjoined from so doing, or sued for damages for so doing. *Mills Co.* v. *Smith*, (Miss.) 30. Am. St. Rep. 546, and full note (s. c. 11 South. 26). But

the question before us is, is it a crime? Here certain legal principles come in. If a crime, it is a new crime, in derogation of right under the common law, and therefore the statute is to be strictly construed, and the case must clearly fall within the statute. Bish. St. Crimes, § 119; Bish. Cr. Law, § 196. Penal statutes "are to reach no further than their words. No person is to be made subject to them by implication, and all doubts concerning their interpretation are to preponderate in favor of the accused." Bish. St. Crimes, § 194. "If a penal statute is susceptible of two constructions, the court will give to it that which is more favorable to the defendant; in other words, penal statutes are to be taken strictly and literally, and cannot be extended by construction. Otherwise stated, the rule is that criminal statutes are inelastic and cannot be extended to cover cases not within the letter, though they may be within the reason and policy, of the law. There can be no constructive violation of a penal statute." 1 McClain, Cr. Law, § 83. "A statute which awards a penalty not known to the common law, and is in a high degree penal, will be limited to such cases as are clearly within its terms." *Com.* v. *Phillips*, 11 Pick. 27; *Com.* v. *Martin*, 130 Mass. 465. This statute imposes imprisonment, and is highly penal, imposing loss of liberty and odium; and I may reasonably ask, did the legislature intend to visit this severity of punishment in every instance of casting sawdust into streams,—a practice so long prevalent in this State? As they knew of this practice, it seems to me they would have made it plainer, if so designed. If so, they have not provided punishment for casting sawdust into the rivers, creeks, and streams: for section 20c., chapter 150. Code 1891, does not prohibit the casting of sawdust into them. The words "offal" and "refuse" do not help the indictment, as the indictment imports nothing more than those things coming from the operation of the mill in the ordinary way. The last clause, "and other putrid, nauseous, and offensive substances," does not help the indictment, because there is no specification of the particular substances. Though it is generally sufficient to follow the very words of the statute, "not unfrequently other rules will require it to be expanded be-

yond the statutory terms. It must fully state the offense and, if this cannot be done in the mere statutory words, it must be expanded beyond them." Thus, where a statute prohibits the sale of rum, brandy, whiskey, or "other spirituous liquors," such words alone will not be sufficient, according to Bish. Cr. Proc. § 623. So, I think, the indictment shows no offense.

But, if I be wrong in this, the evidence shows no offense. It does not show that this brook was used for domestic purposes. The fact that the statute uses the words, "well, cistern and spring," in immediate connection with "brook or branch," indicates that the legislature meant that the brook must be used for household purposes, and it is not shown that it was so used. And, furthermore, the evidence does not prove that sawdust is putrid, nauseous, or offensive. The most the evidence does show is that in time of drought the sawdust discolors and produces an apparent ooze, not in that brook, but in Wolf creek, and that cattle sometimes would not drink the water in that creek. Now, the statute does not punish for throwing into a brook things that, by consequence, foul a creek into which it runs. That is not the offense created by the statute. As said above, there is no statute denouncing as a crime the act of throwing sawdust into a creek, or of fouling the water of a creek by sawdust, though section 20c makes it a crime to foul a creek by the deposit in it of other things. Therefore, I think, the motion for a new trial should have been sustained. Judgment reversed, verdict set aside, demurrer sustained, and indictment quashed.

Reversed.

CHARLESTON.

WHITE *et al.* *v.* STRAUS *et al.*

Submitted February 7, 1900.—Decided April 7, 1900.

1. TAX SALE—*Redemption—Right of Infants.*
   If real estate is sold for the nonpayment of taxes thereon, and the right of redemption, under the statute, belongs to or accrues to an infant by reason of title vested, such right may be exercised in behalf of such infant during infancy, and by himself personally within one year after he becomes twenty-one years of age. (p. 795).

2. TAX SALE—*Right of Infants.*
   The real estate of an infant should not be decreed for sale until the liens thereon are ascertained and fixed. (p. 799).

Appeal from Circuit Court, Wood County.

Bill by Leland R. White and others against William M. Straus and others. Decree for plaintiffs, and defendant, Straus, appeals.

Modified.

W. N. MILLER, for appellant.

DAVE D. JOHNSON, for appellees.

DENT, JUDGE:

In the case of Leland R. White and Lohnier White, infants, against William M. Straus and others, from the circuit court of Wood County, the principal question is as to the right of the infant plaintiffs to redeem a certain lot from a tax sale made during the life of their father, but which, by reason of his death within the year of redemption, became their property. The facts are as follows: Arthur L. White, the father of plaintiffs, was the owner of a house and lot in the city of Parkersburg. Being in the government employ, he moved to the West, and placed his property in the care of agents, to be rented or sold. They permitted it to be returned delinquent for the taxes of 1893 and 1894, and in December, 1895, twenty-three feet thereof

was sold for such delinquency, and William M. Straus became the purchaser. Holmes Hiteshaw, the agent, and a relative of Straus, notified White of the sale, and that he had not sufficient funds to redeem it, and that it would require twenty-two dollars and fifteen cents to do so. White sent him the money, and Hiteshaw still postponed redeeming it; claiming that the amount was not sufficient. Before the matter could be settled, White died. His widow then tried to find out the amount of money required for redemption, but was postponed from time to time until the year expired, when she was informed by the agent that the purchaser, Straus, would not allow the redemption, and had applied for and obtained a deed, but was willing to pay two hundred dollars for the residue of the property. The infants, by their next friend, filed their bill, asking that the property might be redeemed and sold for their benefit, as they had no means to repair it so as to make it rentable. Straus filed a supplemental answer, setting up ownership to the whole lot, and alleging that the residue of the lot had been sold for taxes accrued since the death of Arthur L. White, to wit, for the years 1895 and 1896, in the month of January, 1898, and that he obtained a deed therefor on the 5th day of January, 1899, while this suit was pending. The circuit court dismissed such supplemental answer, and decreed a redemption and sale acccording to the prayer of the bill.

Straus appeals, and insists that the plaintiffs are not entitled to redeem the property now, but that his title became indefeasible one year after his purchase. This question depends on the construction of section 30, chapter 31, Code, which provides that "an infant, married woman or insane person whose real estate may have been so sold during such disability, may redeem the same by paying to the purchaser, his heirs or assigns, within one year after the removal of the disability the amount for which the same was sold," etc. The appellant claims that this only applies to such sales where the infant owns the real estate in his own name at the time the sale was made by the sheriff, and not to real estate inherited by him after such sale, yet within the period of redemption; that is, if he inherits the land just before the sale is made, the law applies, but,

if he inherits it just after the sheriff makes the sale, the law does not apply, and the infant has only the right of redemption accorded to an adult. This contention is sustained by the decisions of the courts of Pennsylvania, Iowa, and Kansas, under very similar statutes. *McCormack* v. *Russell*, 25 Pa. St. 185; *Stevens* v. *Cassady*, 59 Iowa, 113, 12 N. W. 803; and *Doudna* v. *Harlan*, 45 Kan. 484, 25 Pac. 883; Blackw. Tax. Titles, § 374. In *Stevens* v. *Cassady*, which follows the Pennsylvania decision, and is followed by the Kansas decision, the reason given for such holding is that to extend the disability of infants to lands acquired after a sale by the sheriff would permit an adult whose property had been sold for taxes to extend the period of redemption by making a deed for the property after sale to his infant children. Could not the adult accomplish the same result by making such deed just before the sale? Or could not any real estate owner, by making a deed to his infant child, postpone the payment of the taxes thereon until after the child became twenty-one years of age? But what could be gained by such postponement? To assume that a property owner will make a fraudulent transfer of his property to temporarily escape the payment of the taxes due thereon, as a reason for depriving an infant of his property and legal disability, is unreasonable, illogical, and unjust. These decisions, too, strictly construe the law, to the detriment of those who are incapacitated thereby from transacting business, and whose property rights, by reason of their disabilities, should be protected and preserved, instead of being made a prey of the law. The holding of the supreme court of Wisconsin is directly to the contrary, and therefore more in harmony with justice and equity. *Jones* v. *Collins*, 16 Wis. 594. On page 605 the court says: "It must be admitted, if this statute is to receive a strict construction, it would cut off the right of the heirs to redeem. But we think it should not receive such a construction. This case comes fully within the spirit of the law, which was evidently passed for the benefit of those laboring under some legal disability, and who were incapable of protecting their own rights. So, although the minors did not own the lands when they were sold for taxes, yet, inasmuch as they became vested with

the title before the tax deed was issued, the case would seem to come fully within the reason and principles of the law which gives them the right of redemption. The rule with regard to the construction of statutes of this character is thus laid down in *Dubois* v. *Hepburn*, 10 Pet. 1, 9 L. Ed. 325. The court says: 'A law authorizing the redemption of lands so sold ought to receive a liberal and benign construction in favor of those whose estates will be otherwise devested, especially when the time allowed is short, and ample indemnity given. The purchaser suffers no loss. He buys with full knowledge that his title cannot be absolute for two years. If it is defeated by redemption, it reverts to the lawful proprietors. It would therefore seem not to be necessary for the purposes of justice, or to effectuate the objects of the law, that the right to redeem should be narrowed down by strict construction.' *Masterson* v. *Beasley*, 3 Ohio 301; *Patterson* v. *Brindle*, 9 Watts 98; *Chapin* v. *Curtenius*, 15 Ill. 427." *Wyatt* v. *Simpson*, 8 W. Va. 394; *Hays* v. *Heatherly*, 36 W. Va. 613, (15 S. E. 223). Our statute differs in its phraseology from the statutes of the other states construed in the foregoing decisions. The Pennsylvania statute is to the effect that if the owner of property sold for taxes "shall at the time of such sale be a minor." The language of the Iowa statute is, "If the real property of any minor, married woman or lunatic be sold for taxes." The Kansas statute is similar, while our statute is, "Any infant, married woman or insane person whose real estate may have been so sold (that is, for taxes) during such disability," etc. The time of sale relates to the disability, and not to the ownership of the property. The person must be under disability at the time the sale was made, so as not to be in condition to redeem the property, under section 15, chapter 31, Code, within one year after the sale. The sale alone does not effect the transfer of the ownership of the property, but the owner at the time of the sale, so far as the statute is concerned, continues to be the owner until all right of redemption is gone, and the title of the property is vested by a proper deed in the tax purchaser. So that, if the owner dies before the time of redemption expires, his ownership does not pass to the tax purchaser, but to his heirs; and

they become, in the eyes of the law, the owners of the property, for all purposes, until their right of redemption is forfeited. Nor does the sale of the property prior to the time the infants become the owners thereof confer any greater rights on the tax purchaser than if the infants were the owners at the time of the sale, and they are as much the owners in one case as in the other. Then why should they be allowed to redeem in the one case, and not in the other? If the land descends to them just before the sale, they are allowed one year after reaching the age of legal capacity to redeem; but if it descends to them just after the sale, according to the claim of the appellant, being under legal incapacity, they cannot redeem at all, but their guardian, if he has funds, or is willing to advance the same, may redeem in their names. If they were adults, they can redeem, but, being infants, they cannot act for themselves. They cannot contract by themselves, and adults may refuse to contract with them. They must sue by next friend, or guardian. If they have no funds, guardian, or next friend, it matters not how valuable their real estate may be. Owing to their disability it must be lost to them forever, because their ancestor did not die immediately before, instead of just after, the sale. This is a distinction without a difference. Whenever infants own land, it matters not whether it came to them before or after the form of sale was gone through by the sheriff, their legal disabilities should secure to them, one year after their disabilities are removed, the right to redeem the same from absolute forfeiture. This is now, and always has been, the just spirit of both the Constitution and the laws of this State. Such provision applies to all the statutes of limitations and the decrees of our courts. If there are instances where it does not, it is because of unintentional legislative oversight. There is no oversight in this case, but the true meaning of the law is plain enough; and this is that if lands are sold which an infant, if an adult, would have the right to redeem, his legal incapacity secures to him one year after he reaches his majority to make such redemption. This construction makes the statute just, equitable, and consistent with itself, and is harmful to no one, although it may prevent a greedy speculator from securing

an infant's estate for little or no consideration by enforcing a confiscation thereof under the forms and sanction of the law. For instance, in the present case the estate of helpless, needy infants, to the value of about three hundred and fifty dollars, is claimed absolutely by the tax purchaser by reason of the expenditure of twenty-two dollars and fifteen cents, and, according to his pretension, they have no redress. He refused to accept the redemption money, amounting, with its interest, when tendered to him by their guardian and next friend, to the sum of forty dollars, and exhibits a willingness to expend many times the amount in unjust litigation with them. He stands by the letter of the law as it appears at first blush, and disregards its spirit. Equity recognizes the Golden Rule as one of its favorite maxims, to wit: "As you would that others should do unto you, do you even so unto them." If a man follow this, he will not stray far from the correct interpretation of any law. If the appellant had said, "As I would have Arthur L. White to do unto my infant children, I being dead, so I will do unto his infant children, he being dead," the true construction of the law under discussion would have been made plain to him, and he would have reached the conclusion that the law would always be construed to avoid injustice and wrong, and promote justice and right, in every possible case. By allowing these infants, by their next friend, to have redeemed their land, he would have lost nothing, but would have received his own, with lawful usury. This is all he had the legal right to ask, and with this he must be satisfied.

Objection is made that the bill alleges that the property was sold only for the taxes of 1894, whereas the deed, which is an exhibit with the bill, shows that it was for the years 1893 and 1894. This is an error that is self-correctory. The deed amends the bill. It is not necessary to enter into the question of fraud, for, if it existed, the law as heretofore expounded has rendered it abortive.

There was no appealable error committed in this case against the appellant, but there is error against the infant defendants. The sale of their property should not have been authorized until all liens against the same for taxes or otherwise were first ascertained and determined. The

plaintiffs being infants having no other estate out of which the taxes can be paid and the property redeemed, a court of equity will sell the property, and out of the proceeds pay for such redemption and all other taxes and other liens against the same; but the amount of such liens should be first ascertained and determined, that a fair sale may be had, and a clear title secured to the purchaser thereof. The decree will be reversed and amended in this respect, and in all things else affirmed, and the cause be remanded, to be further proceeded in according to the rules and principles governing courts of equity. The plaintiffs substantially prevailing, the appellant must pay the costs of this appeal.

Modified.

CHARLESTON.

HARVEY *v.* CURRY.

BRANNON, JUDGE, *dissenting*.

Submitted January 17, 1900—Decided April 7, 1900.

1. MARRIED WOMAN—*Separate Estate—Charge Thereon.*

A purchase money note, specifying therein the property on which it is a lien, signed and acknowledged by a married woman, and duly recorded, is not evidence sufficient of a general charge against her separate estate, under section 12, chapter 109, Acts 1891 (Code, chapter 66). (pp. 802-803).

Appeal from Circuit Court, Cabell County.

Bill by H. C. Harvey against Emily J. Curry. Decree for defendant, and plaintiff appeals.

Affirmed.

CAMPBELL, HOLT & CAMPBELL, for appellant.

MARCUM, MARCUM & SHEPHERD, for appellee.

DENT, JUDGE:

H. C. Harvey, executor, etc., appeals from a decree of the circuit court of Cabell County, rendered in a chancery cause in which he was plaintiff and Emily J. Curry was de-

fendant. The facts are as follows, taken from the brief of plaintiff's counsel: "On the 1st day of December, 1892, petitioner's testator, then in life, was seised and possessed of certain lots in Milton, Cabell County, West Virginia, with a hotel situated thereon. He sold, and by deed conveyed the same to Emily J. Curry, then and now the wife of B. F. Curry, for the consideration of one thousand five hundred dollars, evidenced by five promissory notes, for three hundred dollars each, payable in one, two, three, four, and five years, with interest. On the same day, the said Emily J. Curry and husband conveyed said real estate to one Rufus Switzer, in trust to secure the payment of said notes. The grantee took possession of said hotel property, and opened business in her own name. Each of said five promissory notes was acknowledged by the said Emily J. Curry before a notary public, and they were admitted to record in the clerk's office of the county court of Lincoln County. She failed to pay the first installment of the purchase money, and the testator, then in life, instituted suit in chancery, on the 26th day of March, 1894, in the circuit court of Lincoln County, seeking to collect that installment out of the separate real estate of the said Emily J. Curry, situated in said Lincoln County. A decree subjecting the rents and profits of said real estate was entered by default, but was afterwards set aside on motion. The testator having died, on the 17th day of November, 1897, your petitioner, as executor, filed an amended bill and bill of revivor. The case was then transferred to the circuit court of Cabell County, by consent of parties. Emily J. Curry then appeared to the amended bill, and demurred to the same, and the court sustained the demurrer, and dismissed the bill, with costs. The deed of trust, and the notes for the deferred installments of the purchase money, were executed when chapter 66 of the Code, as amended by the Acts of 1891, was in force. After the original bill had been filed, and before the death of the testator, the real estate was sold under the deed of trust, bringing one thousand dollars, which, after paying the costs of the sale, was applied to the fourth and fifth notes and their extinguishment, and the balance credited on the third note, leaving the first and second notes, and a por-

tion of the third, remaining unpaid. The debt sought to be collected was for purchase money of real estate conveyed to her, as her sole and separate property. Her promise to pay the same was evidenced by writings signed by her, to wit, the deed of trust and the notes; and they were both acknowledged and recorded, as required by section 12 of chapter 66, as amended by the Acts of 1891, and they show upon their face for what said debt was created. The bill also shows that she is the owner of separate real estate in Lincoln County, the rents and profits of which petitioner was seeking to subject to the payment of said debts. The court below sustained the demurrer upon the ground that there should have been some express language by Emily J. Curry, either in the notes or deed of trust, expressing an intention to charge her separate property, real and personal, and the rents, issues, and profits thereof, to the payment of said debt."

The deed of trust, having been given to cover the specific property therein conveyed, cannot be held to cover or apply to any other property, but must be confined to the property covered thereby. The notes being secured thereby, presumptively shows an intention by the grantor and obligor not to charge any other property with their payment. The only question, then, presented is whether the law makes the notes a charge on the obligor's general separate estate, without any expressed intention to do so on her part, under section 12, chapter 66, Acts 1891. The notes are in the following form, to wit:

"$300.00.

"Two years after date I promise to pay to the order of Ro. T. Harvey, three hundred dollars, with interest from date (interest payable annually). This note is given as part of the purchase money for the hotel property in the town of Milton, West Virginia, this day conveyed to me as for my separate estate by said Ro. T. Harvey.

"Witness my hand this 1st day of December, 1892.

her
"EMILY J. x CLARK.
mark

"Executed and acknowledged before the subscriber this 1st day of Decem. 1892.

"T. M. Smith, N. P."

It certainly seems plain from the reading of the statute that it was not the intention of the legislature to leave so important a matter open to question, but that the language used was to put it beyond cavil or dispute. It is equivalent to saying that a married woman may charge her separate property and estate, real and personal, and the rents, issues, profits, and increase thereof, by a writing duly executed and acknowledged by her, and duly recorded in the proper clerk's office, stating the amount of the debt and for what it was created, The execution and acknowledgment of a note does not evidence any intention on her part to charge her general separate estate, especially when specific property is therein mentioned on which such note is to be a lien. Had she intended so to do, it would have been so provided in the deed of trust. The same section permits her to charge her separate estate for the wages of a domestic or laborer, or for the necessaries of life for herself or children, by the mere contraction of a debt for these purposes. So that the execution and acknowledgment of the writing for the other specified purposes is not to show the amount of the debt, and for what purpose it was created, as these things, as in the other cases mentioned, could be easily established by extraneous evidence; but that, being for the purpose and the amount mentioned, she is willing and does make the same charge against her separate estate, thus acting advisedly and with full knowledge of the facts. The object of the law being to prevent her separate estate being devoured by charges against the same without her express will or consent, except as to the wages of domestic or laborer, or for necessaries for herself or children, the charge may be so implied. It is the charge made by her that is to be evidenced by a writing showing the amount and purpose, and such charge is not to be left to implication; otherwise, acknowledgment would be wholly unnecessary.

Affirmed.

BRANNON, JUDGE, (*dissenting*):

I think that, as both deed of trust and notes show what the debt was contracted for, and that it was such a debt as the married woman was by the act of 1891 allowed to

contract, and those instruments were recorded, the debt binds all her estate. Before that act no one would question this, and that act only intended to curtail her contracting capacity by limiting it to certain debts, and this, being a debt allowed by the act, has the force of a debt made before that act. Notice that the act does not say that the instrument to charge shall specify the property charged, but only the amount of the debt, and for what contracted. A debt created for one piece of separate estate binds all, to be enforced by proper process. If contracted before chapter 3, Acts 1893, I think by chancery, to subject rents and profits during coverture; if after that act, by judgment binding the *corpus* or fee as a lien to be enforced by execution against personalty or in equity against her land. *Williamson* v. *Cline*, 40 W. Va. 194, (20 S. E. 917); *Oney* v. *Ferguson*, 41 W. Va. 568, (23 S. E. 710).

CHARLESTON.

BURLINGHAM *et al.* *v.* VANDEVENDER.

Submitted January 11, 1900—Decided April 7, 1900.

1. CONTINGENT ESTATES—*Parties.*

   Section 20, chapter 71, Code, relating to the sale of contingent estates, in requiring all persons then living and contingently interested to be made defendants, includes only nonascertainable or not in being. (p, 805).

2. DECREE—*Remote Interests—Parties.*

   A decree rendered for the sale of real estate subject to contingencies is binding on all those who are remotely interested, and whose identity is legally nonascertainable, when their possible contingent interests are represented by proper parties to the suit, holding similar estates, prior in right. (p. 808).

3. EQUITABLE DOCTRINE—*Parties.*

The equitable doctrine of representation by persons similar and prior in estate, for the purposes of convenience and justice, applies, of necessity, in all cases where possible heirs or devisees contingently interested are physically or legally not in being, or nonascertainable. (p. 807).

Appeal from Circuit Court, Roane County.

Bill by Lillie R. Burlingham and others against M. L. Vandevender. Decree for plaintiffs, and defendant appeals.

Affirmed.

J. G. SCHILLING, for appellant.

WALTER PENDLETON, for appellees.

DENT, JUDGE:

Lillie R. Burlingham and Morris O. Brooks instituted a suit in chancery in the circuit court of Roane County to enforce the payment of a certain balance of purchase money against a tract of land purchased of them by the defendant, M. L. Vandevender, and obtained a decree for the sale of the same, from which the defendant appeals. The facts are as follows: The defendant purchased the land, and they sold it, in fee. On an examination of their title, it is found that they only had a life estate, and the fee was contingently invested in their children, or, in absence of their children, in their legal heirs. They immediately instituted suit, under section 20, chapter 71, Code, for the purpose of acquiring the fee, so, that they might comply with their sale to their vendee. Such proceedings were had that the circuit court of Kanawha County directed the sale of the land. Mrs. Burlingham became the purchaser, and the sale was confirmed, and the property conveyed to her by a commissioner of the court. She executed and tendered a deed to Vandevender, who refused to accept the same, and this suit was instituted and the deed tendered therein. Vandevender claims that the deed, under the decree, is not sufficient to vest in him the fee to the land, and asks that the sale be canceled, and that the parties be restored, as near as may be, to their original

condition. The circuit court, being of the opinion that the deed was sufficient to convey the fee, granted the relief prayed by the planitiffs. The devise under which the plaintitts acquired their estate in the land, contained in the will of their mother, Cynthia E. Brooks, deceased, is as follows, to wit: "I bequeath to my children, Lillie R. Brooks Burlingham and Morris Oden Brooks, all the real estate (by which I mean houses or lands) of which I may die possessed or entitled to, or in which I may leave an interest, whatsoever, to have the same so long as they may live, in equal proportions; at their death the same to descend to their respective children, *per stirpes*, and not per capita. Should either of my said children die before the other, having no children living, I bequeath all the interest of the said child so dying to the survivor of my children to be held in like manner as such survivor holds the property (real estate) received from me. Should both of my children die childless, I leave all of said real estate to their lawful heirs."

Section 20, chapter 71, Code, under which title in fee was sought to be acquired, is as follows: "When any estate, real or personal, is given by will or deed to any person subject to a limitation contingent upon the dying of any person without heir or heirs of the body or issue of the body or children or offspring or descendant or other relative, it shall be lawful for the circuit court, upon a bill filed by the person holding the estate subject to such limitation, in which bill all persons then living and contingently interested shall be made defendants, to decree a sale of such estate, real or personal, and to invest the proceeds of sale, under the decree of the court, for the use and benefit of the person so holding the estate, subject to the limitation of the deed or will creating the estate. * * * "To their suit to acquire the fee the children of Mrs. Burlingham and the father of the plaintiffs were made parties, as being the known persons contingently interested in the land. The only question then presented is as to the jurisdiction of the circuit court to make sale so as to perfect the title. The statute provides that "all persons then living and contingently interested shall be made defendants." This is an impossibility in this case,

for no one can tell who are the living persons contingently interested, as no one is the "heir of the living." For a case of this kind the statute has evidently made no provision, and, unless the rules of equity as to necessary parties under the doctrine of representation have provided a remedy, such property so situated would be tied up indefinitely. In 15 Enc. Pl. & Prac. 627, the law is stated to be that "where it appears that a particular party, though not before the court in person, is so far represented by others who are before the court in person that his interests receive actual and efficient protection, his actual joinder may be dispensed with, and the decree may be held to be binding upon him." This rule is founded on convienence, and often the necessity of things. As is said in the case of *Faulkner* v. *Davis*, 18 Grat. 690, it "applies to living persons, who are allowed to be made parties by representation, for reasons of convenience and justice, because their interests will be sufficiently defended by others who are personally parties, and who have motives both of self-interest and affection to make such defense, and it is therefore unnecessary to make such living persons parties, and, indeed, improper to do so, and thus compel them to litigate about an interest which may never vest in them. But the rule also often, and a *fortiori*, applies to persons not in being, and who, of course, may never be in being, who are allowed to be made parties by representation, for reasons, not only of convenience and justice, but of necessity, also, because it is impossible to make them personally parties. It will be found by an examination of all the cases that the rule and the reason of it go to this extent, and that necessity is recognized as an all-sufficient reason for it, whenever such necessity exists. In *Giffard* v. *Hort*, 1 Schoales & L. 409, Lord Redesdale uses this language, which is quoted by Judge Lee in *Baylors's Lessee* v. *Dejarnette*, 13 Grat. 152: 'Where all the parties are brought before the court that can be brought before it, and the court acts on the property according to the rights that appear, without fraud, its decision must, of necessity, be final and conclusive. It has been repeatedly determined that if there be tenant for life, remainder to his first son in tail, remainder over, and

he is brought before the court before he has issue, the contingent remainder-men are barred.' See, also, *Finch* v. *Finch*, 2 Ves. Sr. 491; Calv. Parties, 52, note 7." *Baylor's Lessee* v. *Dejarnette*, 13 Grat. 152; *Troth* v. *Robertson*, 78 Va. 46; Story Eq. Pl. §§ 142, 147, inclusive. In the case of *Hale* v. *Hale*, 146 Ill. 227, 33 N. E. 858, 20 L. R. A. 247, it is said: "Especially is this doctrine applicable where the persons not before the court are only possible parties not *in esse*, and where the interests of all parties in being require a decree which will completely and finally dispose of the subject-matter of the litigation." Heirs of living persons are just as much not in being as though they were persons unborn, and it would not only be inconvenient, but unjust, to prevent the enjoyment of estates by those who are in being and known, because of a remote contingency that such estates may some day pass to persons unknown and nonascertainable. If proper parties are before the court to represent all interests, so that the same may be properly adjudicated, the decree is complete and conclusive on all unknown persons who may be remotely and contingently interested. When the decrees under considertion were rendered by the circuit court, all interests were represented as fully as it was possible to do so, and even more fully than the law required, because it was hardly necessary to make possible heirs parties, when the whole estate was already represented by the life tenants and the children in whom the contingent remainder vested, which could only be defeated or interfered with by the birth of other children or their death before the life tenants. The interests of all possible heirs were amply represented and protected. The only object of the suit was to change the character of the estate, and preserve and render it productive and profitable, for the benefit of both the life estate and the remainder. The conclusion, therefore, is that by the decrees and deeds made in pursuance therewith the indefeasible fee of the land vested in the plaintiff, subject only to the vendor's lien. The costs of the appeal follow the result of the litigation. The decree is affirmed, and the cause remanded for further proceedings.

Affirmed.

CHARLESTON.

WATSON v. HURRY *et al.*

47 809
49 6
49 7
47 809
54 81

Submitted February 2, 1900—Decided April 7, 1900.

1. APPEAL—FROM JUSTICE—*Appellee.*

Where a party appeals to the circuit court from a judgment rendered against him by a justice, he cannot, on his own motion, have his appeal dismissed, and the judgment of the justice affirmed, over the objection of the appellee. (p. 811).

Error to Circuit Court, Barbour County.

Action by J. Creed Watson against J. H. Hurry and others. Judgment for defendants and plaintiff brings error.

Reversed.

SAMUEL V. WOODS, for plaintiff in error.

W. T. ICE and W. B. KITTLE, for defendants in erorr.

ENGLISH, JUDGE:

On the 15th day of May, 1897, J. C. Watson brought a civil action for the recovery of money against W. E. Watson and J. H. Hurry, demanding judgment for two hundred dollars. On July 19, 1897, a trial was had, and judgment rendered in favor of J. C. Watson for forty dollars and costs. On June 29, 1897, the defendant, Hurry, appealed from the judgment of said justice to the circuit court of Barbour County; and on June 1, 1899, the appellant, J. H. Hurry, by his attorney, moved the court to dismiss his appeal and confirm the judgment of the justice, which motion was resisted by the plaintiff, J. C. Watson; and said motion was sustained, and the appeal dismissed, and it was further considered by the court that the judgment of the justice be confirmed, and that the plaintiff recover from the said J. H. Hurry, S. A. More, and C. J. Teter, who signed the appeal bond, the sum of forty-

three dollars and forty cents, being the amount of said judgment and costs, with damages thereon at the rate of ten per cent. per annum from June 20, 1897, the date of said appeal, until paid, and the costs of the suit in the circuit court expended, to which action and ruling of the court said J. C. Watson excepted, and obtained this writ of error.

It is claimed by the plaintiff in error that the circuit court erred in allowing appellant to dismiss his appeal over his objection; also, that it was error to affirm in the circuit court the judgment of the justice, without a new trial, against the objection of the plainiff in error, for the reason that the appeal vacated the judgment of the justice, and entitled the appellee to a trial upon the appeal *de novo* Did the court err in allowing the appellant, Hurry, to dismiss his appeal, and then by proceeding to confirm the judgment of the justice, with interest and costs? As the case stood upon the docket of the justice, the plaintiff, Watson, had a judgment against Hurry for forty dollars and costs. Not being satisfied with that, Hurry appealed to the circuit court, which had the effect of not only entitling him to a trial *de novo*, but of vacating the judgment. See Freem. Judgm. p. 598, § 328; also, *Evans* v. *Taylor*, 28 W. Va. 188, in which SNYDER, JUDGE, delivering the opinion of the Court, said: "In such case, where the effect of the appeal is to transfer the action to an appellate court, in which the cause is to be tried *de novo*, and the controversy is to be settled by a judgment in such court, regardless of the judgment appealed from, the appeal operates, not only to suspend the judgment of the justice or inferior tribunal, but vacates it and sets it aside, so that it cannot be used as evidence or as the foundation of an action in any court." Such being the case, it is at once perceived what injustice and wrong would be inflicted upon the plaintiff in error if the action of the court below were affirmed. The defendant in error by his appeal deprives the plaintiff in error of any benefit of his judgment from its date, June 19, 1897, until June 1, 1899, and then, not willing to incur the risk of a new trial, dismisses his case, and asks the court to confirm the judgment of the justice, when the statute expressly says that, if either party require it, a jury shall

be selected and impaneled to try the cause, and that all lawful evidence produced in relation to the matter in difference shall be heard, whether such evidence was produced before the justice or not, and the cause shall be determined, without reference to the judgment of the justice, on the principles of law and equity. So, that, when a case is brought into a circuit court on appeal from a judgment of a justice, the right to a trial *de novo* is not confined to the appellant alone, but both parties have the right to have the case heard and determined without reference to the judgment of the justice; and the appellant, having brought the case to the circuit court, cannot ask that court to affirm the judgment of the justice, and thereby avoid the risk and consequences of a new trial, which his action has entitled the appellee to have, either before the court or a jury. For these reasons, the judgment complained of is reversed, and the case remanded.

Reversed.

CHARLESTON.

DAVIS v. VASS *et al.*

Submitted January 20, 1900—Decided April 7, 1900.

1. JUDGMENT LIEN—*Equitable Interest.*

B. sold a tract of land to V. for five hundred and fifty dollars, of which V. paid two hundred and fifty dollars, and went into possession of the land, occupying it with his family. V. paid no more on the land, and left his family to maintain themselves, but returning home and remaining at his pleasure. B., claiming that V. had relinquished his purchase, sold the land to I., the wife of V., for three hundred and six dollars, she paying in cash seventy dollars from her

own means, and giving her notes for the residue of the purchase money. D., having a judgment against V., rendered on a debt existing at the time V. paid the two hundred and fifty dollars on the land, filed his bill to enforce his judgment against V.'s equitable interest in the land. ***Held***, that such interest was liable to the judgment. (pp. 813-814).

2. LIEN—*Priority—Subrogation.*

I., having purchased the land in good faith, without knowledge of D.'s debt against V., and having paid the seventy dollars from her own means, is entitled to be substituted to the rights of B. as vendor to that amount prior to the claim of D. (p. 814).

3. LIEN—*Unpaid Purchase Money.*

The balance of the purchase money unpaid and due to B. from I. is the first lien on the said land. (p. 816).

Appeal from Circuit Court, Summers County.

Bill by George N. Davis against Isabelle Vass and others. Judgment for plaintiff, and certain defendants appeal.

Reversed.

A. R. HEFLIN and J. W. ARBUCKLE, for appellants.

J. W. DAVIS, for appellee.

MCWHORTER, PRESIDENT:

This was a suit to enforce a judgment of George N. Davis against J. F. Vass for sixty-three dollars and ninety-eight cents and three dollars and five cents costs against a tract of land sold by J. C. Bright to said Vass for the consideration of five hundred and fifty dollars, of which two hundred and fifty dollars was paid, and Vass placed in possession of the land. Vass failed to pay any more of the purchase money, and Bright sold the land to Belle Vass, the wife of J. F. Vass, for three hundred and six dollars and fifteen cents, of which she paid seventy dollars or seventy-five dollars, and gave three notes for the residue, payable in the future. Bright claimed that the contract between himself and J. F. Vass was rescinded some sixteen or eighteen months before the sale by Bright to Mrs. Vass. Vass and his wife and family remained in possession of the property from the time it was sold to J. F. Vass up to the time this suit was instituted. Plaintiff's bill charges that at the time Vass purchased he owed the debt to plain-

tiff, which was reduced to a judgment, and execution issued thereon, and the same returned, "No property found;" that Vass owed divers other creditors, and was insolvent, and that he procured the sale to be made to his wife to hinder, delay, and defraud plaintiff and other creditors; that Belle Vass had no estate, real, personal or mixed when Vass purchased the property, or when she married Vass, and that she had acquired none up to the time she gave the notes, and she took the title bond to herself for the land to enable her said husband, J. F. Vass, to cheat his creditors, and especially the plaintiff, and to hinder and debar his creditors in the collection of their debts; that said title bond was taken by fraud, and is void as to plaintiff's debt, and that Belle Vass had never paid one cent to Bright for said land, but, so far as payments were made, they were made by the property and money of J. F. Vass. Defendant, Belle Vass, answered the bill, denying all fraud or knowledge of fraud, and that she knew anything of the debt of plaintiff against her husband, and that it is a lien or in any wise a charge upon the land in controversy; avers that she purchased the land from Bright on the 13th of November, 1897, for three hundred and six dollars and fifteen cents,—paid cash seventy dollars from her own means, and without the advice or consent of her said husband, and gave her notes for the residue; that as matter of fact her husband does not stay at home with her but very little of the time, and for several years she and her two sons have maintained and supported themselves, and have virtually had no aid from her husband; that she is informed that her said husband, J. F. Vass, did at one time contract for the land with Bright, but failed to comply with his contract, and that about August, 1896, he resold the same to Bright for the purchase money; that she learned the land was for sale, and upon seeing Mr. Bright, entered into the said contract of purchase; that the purchase was in entire good faith, and without any intention to defraud, and denies each and every allegation of the bill not admitted in the answer. Defendant, Bright, also answered the bill, and admits that he at one time sold the land to J. F. Vass, but, he having failed to pay for it, and being unable to do so, the contract was rescinded, and that about two

years thereafter he sold it to Mrs. Vass, who paid him cash seventy dollars, and gave her three notes for the residue of the price, which was three hundred and six dollars, the contract and notes dated November 13, 1897; that all of said notes are due and unpaid; denies all charges of fraud and collusion made in plaintiff's bill; and avers that the sale to Belle Vass was a *bona fide* transaction, and for valuable consideration, and in no way connected with J. F. Vass, and that respondent has a lien on said land for the amount still due from Belle Vass prior in time and paramount in equity to plaintiffs' claim, and asks that his interests be protected, having fully answered, etc. Depositions of witnesses were taken and filed in the cause, which was heard on the 9th of February, 1899, when it was found that the legal title to the land was in J. C. Bright, but that, J. F. Vass having purchased the land from Bright, and paid at least the sum of two hundred and fifty dollars on account of the purchase money, and the attempt to rescind that contract and make a new sale to defendant, Belle Vass, the wife of said J. F. Vass, was a fraud on the rights of plaintiff, Davis, and that the said J. F. Vass still had an equitable interest in the land to the extent of two hundred and fifty dollars, which is liable to plaintiff's debt; and it was decreed unless said J. F. Vass pay to plaintiff, Davis, seventy-eight dollars and fifty four cents with interest, within thirty days, that the said land be sold by the commissioners named in the decree for the purpose on the terms set out,—enough cash to pay costs of suit and expenses of sale, the residue in two payments at six and twelve months, with interest from date, taking purchaser's bonds with good personal security,—and the proceeds, when collected, be paid—First, to the plaintiff said sum of seventy-eight dollars and fifty-four cents, with interest from date of decree; second, to J. C. Bright, two hundred and forty-three dollars and twenty-seven cents, being the amount due from Belle Vass to said Bright on the purchase set up in her answer; and, third, to Belle Vass any residue that may remain in the hands of the commissioners arising from the sale. Defendants, Belle Vass and J. C. Bright, appealed from this decree, and clai n that the court erred in holding the land to be the property of J. F. Vass, and lia-

ble for plaintiff's debt, and also in holding that J. F. Vass had an equitable interest in the said land to the extent of two hundred and fifty dollars, and that the attempt to rescind the contract between Bright and J. F. Vass and make a new sale to defendant, Belle Vass, was in fraud of the rights of plaintiff, Davis. Defendant, J. F. Vass, purchased the land for the sum of five hundred and fifty dollars, paid on account of it two hundred and fifty dollars, took possession, and remained in possession, together with his wife, Belle Vass, and their family. The proof is that he was gone from home the most of the time, almost deserting his family, yet according to the evidence, including the testimony of Belle Vass herself, he still returns and remains with his family as long and as much as he chooses. Bright says in his answer that the contract with Vass was rescinded, and that about two years after that was done he sold the land to defendant, Belle Vass. The plaintiff makes Bright his witness and he testifies that Vass forfeited the land to him (Bright) for nonpayment of purchase money, and relinquished all his claims thereto, and that all evidence of his indebtedness to witness was destroyed; that he was the *bona fide* owner of the land from sixteen to eighteen months after getting it back from Vass, when he sold it to Belle Vass for three hundred and six dollars and fifteen cents, of which she paid seventy dollars or seventy-five dollars, and gave her notes for the residue. Bright, in his answer, says, Vass had failed to pay for the land, and was unable to do so; and in his testimony, when asked if he did not know J. F. Vass to be insolvent at the time he sold the land to Belle, he said he knew nothing about his circumstances then. It is not denied, but admitted by Bright, that J. F. Vass, when he bought it, paid two hundred and fifty dollars, and it clearly appears that, in selling to Belle Vass, this large payment, amounting to within twenty-five dollars of one-half the whole price of the land to be paid by J. F. Vass, was allowed to Belle in the contract made with her for the sale of it, and Bright claims to retain the whole of the two hundred and fifty dollars as forfeited to him because of the failure of said J. F. Vass to pay for the land as per the contract. Doubtless Bright was intending to carry out his contract with Vass by mak-

ing sale to his wife, and giving her the benefit of the large payment Vass had made, which would be well enough if it could have been done without in any way interfering with the rights of creditors of Vass. J. F. Vass continued in possession of the property after Bright claims that he had sold to Belle Vass. At any rate, there is nothing to show that Belle had exclusive possession, or to show that J. F. Vass surrendered the possession to Bright. In *Cunningham* v. *Cunningham*, 46 W. Va. 1, (32 S. E. 998), it is held: "Oral waiver or abandonment of an oral contract for the purchase of land will, in equity, defeat specific performance sought by the purchaser, if possession be surrendered to the vendor; but not otherwise." J. F. Vass took possession, and went onto the land with his family, and so continues, according to the testimony of Belle Vass. The interest of J. F. Vass in the land to the extent of the two hundred and fifty dollars paid by him must be held liable to his creditors. The payment of the seventy dollars or seventy-five dollars made by Belle Vass to Bright is sufficiently and clearly shown to have been made from her own funds and resources, and she should be entitled to substitution for such payment to the rights of the vendor, Bright, as so much of the vendor's lien, and consequently prior to plaintiff's claim, the disallowance of which is assigned as error by appellants; and it is also assigned as further error that the court gave preference and priority to plaintiff's claim over that of the vendor, J. C. Bright, which is error. The prayer of plaintiff's bill gives preference, and very properly so, to the claim of J. C. Bright, and asks that he be first paid and secured; that the claim of plaintiff be paid. Appellee contends that neither of the appellants has any standing in this court, and that their appeal should not be entertained for want of jurisdiction, the matter in controversy being simply pecuniary. In *Faulconer* v. *Stinson*, 44 W. Va. 546, (29 S. E. 1011), "when a sum less than one hundred dollars is decreed as a lien against land, and a sale directed, it is not a case involving title to land, and the defendant cannot appeal." *Berry* v. *Cunningham*, 37 W. Va. 302, (16 S. E. 463). The matter in controversy involved as to appellant Bright is simply pecuniary, and involves alone the question of the priority of

the lien of the judgment of plaintiff over his vendor's lien, which judgment is less in amount than one hundred dollars, exclusive of cost. As to the appellant, Belle Vass, under the authority of *McClaugherty* v. *Morgan*, 36 W. Va. 191, (14 S. E. 992), the court has jurisdiction. As the decree must be reversed as to the appellant, Belle Vass, it will also be reversed as to the error in giving plaintiff's claim priority over the vendor's lien of J. C. Bright, and the cause will be remanded that the decree may be corrected as indicated herein.

Reversed.

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47 817
54 702

CHARLESTON.

HOOD v. MORGAN *et al.*

Submitted January 30, 1900—Decided April 7, 1900.

1. BILL—*Allegations—Evidence—Decree.*
   Every fact necessary to make out the case must be certainly and positively alleged, for the court pronounces its decree as based upon the allegations as well as the evidence. (p. 820).

2. NOTE—*Judgment—Subrogation—Contribution.*
   B. brought her action against C., the principal, and C., H., and M., as sureties, on a note. M. denied making the note. Case tried by jury; H. taking an active part, consulting and as witness in behalf of plaintiff, seeking to hold M. liable on the note. Verdict and judgment for M. against B. for costs, while plaintiff recovered against the other defendants. H. paid the judgment of plaintiff in full, and sued M. for contribution as co-surety. *Held*, that, H.'s right being only by subrogation to the rights of B., M. was not liable for contribution, not having been liable to B. on the note. (p. 821).

Appeal from Circuit Court, Marion County.

Bill by William Hood against J. M. Conaway and others. Decree for plaintiff, and defendant, Morgan, appeals.

Reversed.

W. S. MERIDITH, for appellant.

A. B. FLEMING, G. A. VINCENT, and R. F. FLEMING, for appellee.

MCWHORTER, PRESIDENT:

This is a suit in chancery by William Hood, prosecuted in the circuit court of Marion County, against J. M. Conaway and others, for the purpose of recovering from defendant, John W. Morgan, as co-security of plaintiff, contribution for money collected from plaintiff by Ann M. Barrackman, as one of the securities of defendant, J. M. Conaway, on a note purporting to be signed by J. M. Conaway, Grafton S. Conaway and J. W. Morgan, all of whom are defendants to this suit, and by the plaintiff, William Hood, for the sum of five hundred dollars, dated September 22, 1896, and payable one day after date to the order of Ann M. Barrackman. The said payee brought her action at law against the makers of said note in the intermediate court of Marion County, when the said John W. Morgan made defense in said action on said note by filing proper pleas and affidavits, denying his signature thereto, and defeated said action, and received a verdict of the jury which tried the case, and the judgment thereon of the court, in his favor, against the said Ann M. Barrackman, while the plaintiff recovered her verdict and judgment on said note against the other defendants to said action, which judgment, amounting, including interest and costs, on September 6, 1897, to the sum of five hundred and fifty-nine dollars and fifty-six cents, was paid wholly by said William Hood, who filed his bill in this cause, setting up the fact of such payment, and praying that defendant, John W. Morgan, be required to contribute as a co-surety on said note, and pay to said Hood one-half the amount he had been required to pay in discharge of said judgment to said Barrackman. Said Morgan filed his demurrer to said bill; which being overruled by the court, he filed his answer, denying the material allegations of the bill. The defend-

ants, Grafton S. Conaway and J. M. Conaway, filed their several separate answers, in which they admit the allegations of the bill. General replications were made to said answers. Depositions were taken and filed, and the cause finally heard on the 13th day of July, 1898, when the court held that said Morgan was a co-surety with plaintiff, Hood, upon the said note, and liable to him for one-half thereof,—the defendants, Grafton S. Conaway and J. M. Conaway being insolvent,—and decreed that said Morgan pay to plaintiff, Hood, two hundred and seventy-seven dollars, with interest thereon from July 13, 1898, and the costs of his suit, from which decree said Morgan appealed to this Court, and assigned the following errors: (1) In overruling defendant's demurrer to plaintiff's bill; (2) in adjudging that defendant was liable to plaintiff for the one-half ot the Barrackman note, and liable to contribute to plaintiff, as a co-surety on said note; (3) in adjudging and decreeing that defendant was in any wise liable on said Barrackman note; (4) in adjudging, ordering, and decreeing that defendant pay to the plaintiff, William Hood, two hundred and seventy-seven dollars, with interest thereon from July 13, 1898; (5) in entering said decree, as the findings therein were not warranted by the evidence in said cause, but were contrary to the law and the evidence; and (6) in hearing said cause on the answers of J. M. Conaway and Grafton S. Conaway, as the same had not been filed in said cause.

It is insisted by the appellant that the bill is defective, in that it failed to allege that plaintiff, Hood, after paying the judgment obtained on said note, used due diligence to obtain reimbursement from the principal debtor, J. M. Conaway, without effect, or that said J. M. Conaway was insolvent. In *McCormack's Adm'r.* v. *Obannon's Ex'r*, 3 Mumf. 484, it is held: "A court of equity will not compel a surety on a bond to contribute to the relief of his co-surety, who has been forced to pay the debt, unless it appear that due diligence was used, without effect, to obtain reimbursement from the principal obligor, or that he was insolvent." Also reported in 5 Am. Dec. 509; 3 Am. & Eng. Dec. Eq. 166; 4 Am. & Eng. Enc. Law 4. The plaintiff fails to allege that he made any effort whatever to obtain reimburse-

ment from the principal debtor before bringing his suit, and there is no sufficient allegation of his insolvency. The only allegation that can be called such, touching that matter, is where plaintiff savs that, at the time said note was executed and delivered to said Barrackman, plaintiff knew that J. M. Conaway was worth very little, if anything, and that, if he did not pay said note, his sureties would have to pay the same, in connection with a further allegation that defendant, J. W. Morgan, had successfully defended the action, as against himself, of Barrackman, on said note; and, after alleging directly and positively the insolvency of Grafton S. Conaway at the time of the rendition of said judgment and since, he says: "The said Grafton S. Conaway and the said J. M. Conaway, both being insolvent, left the whole burden of said note and said judgment upon the plaintiff, who was obliged to, and did, pay the same," etc. This is not a distinct allegation that said J. M. Conaway was at the date of said judgment, and had continued since, insolvent. "Every fact necessary to make out the case must be certainly and positively alleged, for the court pronounces its decree as based upon the allegations as well as on the evidence." *Guano Co.* v. *Heatherly*, 38 W. Va. 409, (18 S. E. 611); Barton, Ch. Prac. 264; Story, Eq. Pl. §§ 256, 257; *Cleaver* v *Matthews*, 83 Va. 801, (3 S. E. 439); *Insurance Co.* v. *Devore*, 83 Va. 267, (2 S. E. 433); *Nash* v. *Nash*, 28 Grat. 686.

Appellant insists that he cannot be required to contribute one-half or any part of the Barrackman judgment on the ground that he was liable to Barrackman as co-surety with plaintiff, as that question was fully settled in the action of Barrackman against the Conaways, Hood and Morgan, wherein there was a trial before a jury of the issue made, and verdict and judgment in favor of Morgan against Barrackman, which action was brought by Barrackman against the makers of the note at the instance of plaintiff, Hood, for the purpose of holding defendant, Morgan, liable as a co-surety; and in the trial of said action it appears, from the record in this cause, that he took an active part in behalf of said Barrackman against said Morgan, both in consulting and as a witness. It also appears that others of plaintiff's witnesses in this cause were also witnesses

against Morgan in that case. There do not appear, from anything in the record, to be any contractual relations between plaintiff, Hood, and defendant, Morgan. The only liablity, if any existed, was that of mutual burden bearers which depended solely on their liability on said note to Barrackman. That matter had been settled by the verdict of a jury, and the judgment of a court of competent jurisdiction, and Morgan found not to be liable on the obligation to Barrackman. In *Corrothers* v. *Sargent*, 20 W. Va. 351, (Syl., point 1): "It is well settled that a point once adjudicated by a court of competent jurisdiction, however erroneous the adjudication, may be relied on as an estoppel in any subsequent collateral suit in the same or any other court, at law or in chancery, when either party, or the privies of either party, allege anything inconsistent with it; nor is it necessary that precisely the same parties were plaintiffs or defendants in the two suits." Also, in *Nave* v. *Adams*, 107 Mo. 414, 17 S. W. 958, 28 Am. St. Rep. 421: "A judgment is conclusive of the issues involved in a controversy, as between the parties and those standing in privity with them, although in the action in which it is pleaded some, only, of the parties are litigants." Plaintiff's right to contribution, if any he had, was based upon Morgan's liability to Barrackman, and plaintiff's subrogation to the rights of Barrackman. If Morgan's liability to Barrackman had been established, his equitable liability to Hood for contribution, after Hood was forced to pay the debt, would have been also established. "Contribution among co-sureties does not arise from any contract between them, but from the principle that equality is equity." *Moore* v. *Moore*, 11 N. C. 358, 15 Am. Dec. 523. In *Russell* v. *Failor*, 1 Ohio St. 327, 59 Am. Dec. 631, it is held that an "action for contribution from a co-surety can only be sustained when a just and equitable ground exists therefor, since the right is founded not in the contract of suretyship, but is the result of a general principle of equity, which equalizes burdens and benefits; and the common law has adopted and given effect to this equitable principal. The contract of suretyship is accessory to the obligation contracted by another, and it is of the essence of the contract that there be a subsisting, valid obligation of a principal

debtor,"—in which case it is said in the opinion of the court, "The utmost extent to which a surety who has made payment can claim is a subrogation to the rights of the creditor so that he will rank against the debtor in the same degree as the creditor would have done if he had not been paid." *White* v. *Banks*, 21 Ala. 705, 56 Am. Dec. 283; 1 Story, Eq. Jur. § 493. "Privies are those who are partakers, or have an interest in any action or thing, or any relation to another." *Marr* v. *Hanna*, 7 J. J. Marsh. 643; *Orthwein* v. *Thomas*, (Ill. Sup.) 21 N. E. 430, 11 Am. St. Rep. 173. For general rule as regards privies, see 21 Am. & Eng. Enc. Law, 139, and authorities cited. In *Briggs* v. *Boyd*, 37 Vt. 534, it is held that, if a surety has no notice of a suit against a co-surety, he is not bound by the judgment, and may therefore show, in a suit against himself by the co-surety for contribution, any legal defense which he might have pleaded in bar of a suit upon the note. That is, if Morgan had not been a party to the action of Barrackman, and the judgment had been alone against Hood, in a suit of Hood against Morgan, for contribution Morgan could have made the same defense he did against Barrackman, and, Hood's rights being by subrogation to the rights of Barrackman, the judgment is *res adjudicata*. In paying off the judgment against himself, Hood cannot claim that he relieved Morgan of any burden, as it had already been determined by the judgment of the court that there was no liability on him by reason of the Barrackman note. The judgment in favor of Morgan against Barrackman was final, and the only way to get rid of the effect of it was by motion for a new trial, or writ of error in case such new trial should not have been granted. It is claimed by appellee that J. M. Conaway signed the name of Morgan to the Barrackman note as the authorized agent of Morgan. Conaway could not act as the agent of Morgan in a transaction with himself as principal. Browne, St. Frauds, §§ 367, 368, and authorities cited; Story, Ag. §§ 9, 10, 210, 211. It is also contended by appellee that Morgan subsequently ratified the action of J. M. Conaway, and promised to pay his proportion of the note. *McMahan* v. *Geiger*, 73 Mo. 145, 39 Am. Rep. 489, was a case where J. H. Creighton made his note to John O'Day for five hundred dollars, with

John F. McMahan as security. No part of the money was received by McMahan. He was simply security. Some two or three months after the execution and delivery of the note, and after the consideration for it had passed, O'Day, the payee, requested Geiger to sign the note, which he did. After default, O'Day brought suit against Creighton, McMahan, and Geiger, process was duly served on the first two, and Geiger made the following indorsement on the back of the writ: "I hereby acknowledge service of the within writ, and waive the necessity of service by an officer, and consent that judgment be entered against me and co-defendants on the same." Judgment by default was rendered against all three of said defendants. McMahan paid in satisfaction of the judgment six hundred and seventy-eight dollars and sixty cents. McMahan brought the suit against Geiger, as co-security, for contribution. The court unanimously held that the defendant Geiger's signing imposed no liability, and that he was not precluded from setting up that defense, as against McMahan, by the judgment. A letter written by Morgan to Hood, dated March 1, 1897, some six months after the making of the Barrackman note, is relied upon as a ratification of the act of signing by J. M. Conaway, and a promise to pay a portion of the note, wherein he says: "Well, Mr. Hood, this seems to be not the proper time to cause any more trouble. So you may consider me a party to the Barrackman note." There is no direct promise in this to pay any portion of the note, and, if there had been, the promise was without consideration. In *Winkler* v. *Railway Co.*, 12 W. Va. 699, it is held that "the promise of one person to pay the debt of another, though in writing, must be founded on a consideration, to make it binding; and, if there is an attempt made to declare upon it specially, the count or counts must set forth the consideration." It is claimed, also, that Morgan agreed at one time to confess judgment on the Barrackman note, and then refused to do so; and, while Morgan denies this, there is evidence tending to prove it to be true. But, without a consideration, it could not bind him, if true.

It is claimed by appellant that the court erred in hearing the cause on the answers of J. M. Conaway and Grafton S.

Conaway, as the same had not been filed in said cause. The answer of J. M. Conaway appears to have been verified on the 19th day of November, 1897, and that of Grafton S. Conaway on the 4th day of December, 1897. While there is no order filing these answers prior to the decree of July 13, 1898, the decree recites that "the cause came on this day to be heard upon the bill and exhibits filed therewith, the separate answers of the defendants, John W. Morgan, J. M. Conaway and Grafton S. Conaway, and exhibits filed therewith, and general replication to said answers," etc. The decree seems to indicate a sufficient filing of said answers. They were evidently in the papers of the cause, and it is a very common practice to file answers and other pleadings, and notice the fact thereof in the same decree adjudicating the cause. Perhaps the better practice would be to first file all the pleadings before the hearing. For the reasons herein stated, the decree will be reversed, and the plaintiff's bill dismissed.

Reversed.

CHARLESTON.

RUHL *et al.* *v.* BERRY *et al.*

Submitted January 27, 1900—Decided April 7, 1900.

1. ASSIGNEE—*Liabilities—Creditors.*
   An assignee for the benefit of creditors ought not to be made personally liable for the notes, bonds, and accounts assigned when they become due, but only at the time when actually collected by him, except such notes, bonds, and accounts as are lost by his negligence or improper conduct. (p. 826).
2. COMMISSIONER'S REPORT—*Errors—Decree Reversed.*
   Although no exceptions are filed to a commissioner's report, and the report is confirmed, if the decree of confirma-

tion upon its face shows material error as to matter of law prejudicial to the appellant, for such error the decree should be reversed. (p, 829).

Appeal from Circuit Court, Braxton County.

Bill by Rhul, Koblegard & Co. against L. J. Berry and others. Decree for plaintiffs, and defendant, Berry, appeals.

Reversed.

W. E. HAYMOND, for appellant.

JOHN B. MORRISON, for appellees.

MCWHORTER, PRESIDENT:

On the 13th of March, 1894, W. E. Harris, Joel E. Berry and M. L. Morrison, merchants, trading as Harris & Berry, made an assignment to L. J. Berry, trustee, of all their goods, wares, and merchandise, of every kind and description, held and owned by them as a firm, and all notes, bonds, claims, or demands for money held by them as such firm, together with all their accounts and other property as such firm, and also all personal property owned by the individual members thereof, and also all the real estate to which they, or either of them, are entitled, seised of, or possess, for the benefit of their creditors, to be sold or disposed of by him at public or private sale, on such terms and conditions as he might deem best, and as soon as it could be done consistently with the best interests of the creditors, first selling the firm property, and collecting and applying to the liquidating of the debts of the firm such of their demands and claims as might readily be collected, and next, such real estate owned by them, or either of them, but that all the social assets that could be realized and collected should be collected and applied to the payment of the social debts, and the social assets to be exhausted before selling or disposing of the individual property, so that, if the social assets would pay the social debts, the individual property should remain unsold; and said trustee was to pay out of the proceeds, first, the "costs and expenses incident to the execution of the trust, including one hundred dollars a month to the trustee for his services, diligently employed, including the provisions

of this deed, the same being deemed reasonable," then to apply ratably to all the debts of the firm, without any distinction whatever, and the residue, if any, to the said Harris & Berry, according to their respective rights; which deed also constituted said L. J. Berry the attorney in fact of the vendors, with full power to demand, sue for, and receive all money, etc. At the March rules, 1897, Ruhl, Koblegard & Co., and seven other firms and creditors of said Harris & Berry, filed their bill in equity in the circuit court of Braxton County against said L. J. Berry, assignee of Harris & Berry, O. K. Sutton, W. E. Harris and P. C. Peterson, late partners as Sutton, Harris & Co., W. E. Harris, J. S. Berry and M. L. Morrison, late partners as Harris & Berry, and George W. Niswander, alleging that O. K. Sutton and W. E. Harris engaged in the mercantile business in the town of Sutton, in Braxton County, as Sutton & Harris, and so continued until the ——day of ———, 189—, when they sold one-third interest in their business to P. C. Peterson, and formed a new partnership as Sutton, Harris & Co., and, while said last-named firm continued in business, they purchased large amounts of goods, and became indebted to plaintiffs, in their respective names and firms, in large amounts of money; that about the 20th of January, 1894, defendant, Peterson, sold his interest in said business to defendant, J. S. Berry and M. L. Morrision, and on the 23d of January, 1894, defendant, Sutton, sold his interest therein to Berry and Morrison; that by said sale the said Berry and Morrison obtained all the interest whatever of said Sutton and Peterson therein, including all outstanding notes and accounts coming to said firm, and by said contracts of purchase said Berry and Morrison assumed the payment of all the indebtedness and liabilities of said firm of Sutton, Harris & Co., including all plaintiff's debts, respectively; that upon the consummation of said sales of Peterson and Sutton, respectively, to Berry and Morrison, said firm assumed the name of Harris & Berry, and continued to do business at same place and in same manner, purchasing goods of plaintiffs, and becoming further indebted to them, respectively, until March 13, 1894, when said firm made an assignment, making defendant, L. J. Berry assignee, and turned over to him all

the property and assets of the firm, and the individual members, for the benefit of plaintiff's debts, which debts then amounted, respectively, after allowing all just credits, to the several amounts set out in the bill, and alleged that said firm, as plaintiffs were informed, owed debts to many other persons, which plaintiffs were unable to enumerate; that said debts all remained unpaid, except a credit of twelve and one-half per cent., paid by said assignee on plaintiffs' debts, respectively, and a credit of twenty-five dollars on debt of Boreman & Strauss; that there was a large amount of goods, wares, and merchandise, notes, accounts, and bonds of said firm, and of the notes and accounts of said Morrison, J. S. Berry, and W. E. Harris, amounting to several thousand dollars and more than sufficient to pay all the indebtedness of said firms and said individuals; that said L. J. Berry, assignee, had failed to properly execute said trust; that he had failed to furnish a proper invoice of said goods, notes, bonds, cash, and accounts of said firm, or of the property, notes, bonds, and accounts of the individuals making said assignment, and had failed to account for the moneys received by him for said goods and property, and on the said notes, bonds, and accounts, except the small payment of twelve and one-half per cent., as stated, paid by him on said debts; that they are entitled to have a settlement of the assignee's accounts, and a proper accounting by said assignee, and to have same applied to their debts, respectively, and file a copy of the deed of assignment; and prayed that the cause be referred to a commissioner for settlement of said assignee's accounts; that he be required to produce and account for all moneys, goods, and property, notes, bonds, and accounts, owned by said firm, or individuals; that he be decreed to pay plaintiff's debts, interest, and costs of this suit; that he be compelled to answer fully the bill, and file with his answer a full and complete statement of all goods property, real and personal, notes, bonds, and accounts of said firm and individuals, and that said Morrison, J. S. Berry, and Harris be required to answer the bill, and file with their answer a statement of all the property real and personal, etc., turned over by them, and each of them, to said trustee or assignee, etc.; and for general relief. On

the 27th of April the cause was referred to Commissioner W. F. Morrison, to settle the accounts of the assignee, Berry, to ascertain and report the debts against the firm of Sutton, Harris & Co., and of Harris, Berry & Co., with their amounts and priorities, and for which the funds in the hands of the assignee are liable, the apportionment of said funds among the creditors of said firms, with any other pertinent matter, etc. On the 31st of May, L. J. Berry, assignee, tendered his answer, which was filed, and plaintiffs replied generally thereto. The said answer denied all the material allegations of the bill; charging him with negligence, failing to account, etc.; averring that he furnished proper invoices shortly after he took charge, and filed with his answer list of claims so assigned to him, and a list showing, by items, the collections and receipts, and of his disbursements; alleging that about three-fourths of the claims were insolvent, and many of the solvent ones were met by offsets; that he had received from collections, the business as conducted by him in clearing out the stock of goods on hand, and from all sources, of the assets turned over to him, the sum of three thousand one hundred and six dollars and twenty-four cents, which he gives by items in list; and that he had disbursed in expenses necessarily incurred and distributed to creditors on the claims the total sum of three thousand two hundred and one dollars and eleven cents, and filed a statement thereof, but which list he claimed did not show all the charges he had a right to make for his own services, nor charges for attorney and counsel fees, which he desired to thereafter specify more particularly, and have allowed him, and that there were also pending settlements and adjustments between him and parties owing the firm, or who by the books of the company appeared to owe it, which matters he had partially, but not entirely, adjusted, and desired to make further report when such matters were fully adjusted, and filed a list of liabilities of said firm, so far as he had notice thereof, amounting to nine thousand five hundred and ninety-seven dollars and sixty-two cents; that he had paid out more than he had received from the assets of the firm; that there are claims in the list mentioned that might yet be realized; that he had been occasioned a great deal of

trouble, and had necessarily taken a great deal of time, in the adjustment and settlement of accounts and affairs of said assignors; that they had their business in a confused condition, and the books could not be relied upon for the ascertainment of the accounts due the firm, mainly by their failure to enter credits for amounts paid them on account with parties with whom they had dealings; and asks that his accounts be settled before a commissioner, and that he be relieved of the insolvent claims which came to his hands by virtue of the assignment, and that he have the proper credits for his services, and his necessary expenses for counsel, etc. On the 30th of August, 1897, E. S. Bland was substituted as commissioner for W. F. Morrison, to take the account ordered, and on the 7th of May, 1898, the cause came on to be heard, among other things, upon the report of E. S. Bland, filed April 23, 1898, and upon the exceptions thereto filed by plaintiffs and by defendant, L. J. Berry, assignee, and exhibits and depositions of witnesses taken before the commissioner and filed; and the court, not deeming it necessary to pass upon the exceptions at that time, re-committed the cause to Commissioner E. S. Bland, with directions to execute the order of reference theretofore made, and make settlement of the account of L. J. Berry, the assignee, and report the further facts as required by said order of reference. On the 19th day of August, 1898, Commissioner Bland filed his report, after retaining it in his office ten days after its completion, and having notified the attorneys of record in the cause of its completion. On the 30th of August, 1898, the cause was "heard on papers read on former hearings, former orders and decrees entered herein, and upon the second report of E. S. Bland, commissioner, filed herein on the 19th day of August, 1898, and exceptions of L. J. Berry to same, filed after the cause had been submitted and passed upon by the court, but before the decree was entered." The court overruled said exceptions, and confirmed the report of the commissioner, and proceeded to ascertain the amount due on each of the claims of plaintiffs and other creditors, "and the court ascertains that there is in the hands of said assignee the sum of two thousand one hundred and forty dollars and forty-one cents applicable to the payment of the

foregoing debts and the costs of this suit," and decreed that said L. J. Berry do pay two thousand one hundred and forty dollars and forty-one cents on account of the debts, as therein directed, after first paying the costs of the suit. The exceptions filed by defendant, Berry, and overruled by the court because filed too late, were to the effect that the commissioner should not have charged him personally with the sum of eight hundred and seventy-one dollars and thirty-three cents on account of judgments rendered in his favor as assignee against various parties, and in so far as he was therein charged personally with the amounts of notes to him as assignee in the amount of one thousand three hundred and sixty-seven dollars and forty cents, and that he should not be charged with the same, or any part thereof, as a personal liability; that it is simply shown that they were uncollected assets in his hands as assignee. The defendant L. J. Berry appealed from said decree, assigning as error that the court should not have decreed against him said sum of two thousand one hundred and forty dollars and forty-one cents, nor should it have entered a personal decree against him for any sum. The commissioner, after settling the accounts of the assignee, charging him with the assets that went into his hands, and giving him credit for his disbursements, allowances, insolvent notes, and accounts, etc., ascertains the unadministered assets in the assignee's hands to be..... $1,994 76

"To which should be added error in crediting cloak twice..... $ 8 00

Thomas' board and expense account, erroneously credited..... 25 50

Freight on machines, improperly credited..... 112 15

——— 145 65

Total unadministered assets $2,140 41"

The commissioner having allowed the assignee credit "for insolvent notes and accounts" in the sum of two thousand two hundred and thirty-two dollars and forty-nine cents, the presumption is that the assets reported as in his hands are all good, and the commissioner does not report any assets lost by the negligence or carelessness of as-

signee. While the appellees in their brief speak of the negligence of the assignee, they say: "In this case nothing is claimed by reason of the negligence of the assignee, but the decree is only for the amount which the commissioner actually ascertained to be in his hands." In his hands how? Not as money which could be applied at once upon the debts to be paid, but "in unadministered assets," which were not shown to have been lost through the assignee's negligence. "An assignee in the discharge of his trust is bound to exercise ordinary diligence and prudence, and may be held liable for such actual loss of assets to the assigned estate as was caused by his culpable negligence or mismanagement." 3 Am. & Eng. Enc. Law (2d Ed.) 121, and cases there cited; Burrill, Assignm. § 410. In *Knight* v. *Earl of Plimouth*, Atk. 480, s. c. 1 Dickens, 124, 126, Lord Hardwicke said: "If there is no *mala fides*, nothing wrongful, in the conduct of a trustee, the court will always favor him; for as a trust is an office necessary between man and man, and which, if faithfully discharged, is attended with no small degree of trouble and anxiety, it is an act of great kindness in any one to accept it. To add hazard or risk to that trouble, and to subject a trustee to losses he could not foresee, would be a manifest hardship, and would be deterring every one from accepting so necessary an office." In *Thompson* v. *Brown*, 4 Johns. Ch. 619, 628, Chancellor Kent expresses his concurrence in these views, and declares that when there is no just imputation of *mala fides*, and the fault is but, at most, an error of judgment, and a want of sharp-sighted vigilance, it would have the appearance of great rigor, and be hardly reconcilable with the doctrines of a court of equity to hold a trustee responsible. In *Reitz* v. *Bennett*, 6 W. Va. 417, it is said that, "an administrator ought not to be charged with the debts due to the estate of his intestate at the time when they become due, but only at the time when he actually received them, except such debts as are lost by his negligence or improper conduct." *Evans* v. *Shroyer*, 22 W. Va. 581; *Cavendish* v. *Fleming*, 3 Munf. 198; *Hooper* v. *Hooper*, 32 W. Va. 526, (9 S. E. 937); *Holt* v. *Holt*, 46 W. Va. 397, (35 S. E. 19). In the case at bar the commissioner's report shows the amount of "unadministered assets"

to be two thousand one hundred and forty dollars and forty-one cents, after giving credit to the assignee for insolvent notes and accounts in more than that amount. The court confirmed the report of the commissioner, finding the amount of unadministered assets to be two thousand one hundred and forty dollars and forty-one cents, and then treated the amount as collected and available for immediate application to the debts and costs of suit, and decreed such payment and application by the said assignee, Berry. The said assignee offered, in open court, at the time of the submission of the cause, to produce said assets, and resign his trust, and moved the court for the appointment of a special receiver to take charge and dispose of such uncollected assets under the direction of the court. In *Reitz* v. *Bennett*, above cited (Syl., point 4): "Although no exceptions are filed to a commissioner's report, and the report is confirmed, if the decree of confirmation, upon its face, shows material error as to matter of law, prejudicial to the appellant, for such error the decree should be reversed." After confirmation of the report, the court should have directed the application of the proceeds of said assets, when collected, to the costs of the suit and the debts as ascertained, and provided for further settlement thereafter by the said assignee. For the reasons herein stated, the decree is reversed, and the cause remanded for further proceedings to be had therein.

Reversed.

CHARLESTON.

47 832
48 460
47 832
50 234
47 832
50 73
47 832
62 421

McINTOSH v. AUGUSTA OIL CO. *et al.*

Submitted February 7, 1900—Decided April 14, 1900.

1. ATTACHMENT—*Equity—Bill—Decree—Jurisdiction.*
Where a suit in equity is brought for the recovery of money, and an order of attachment is issued in the case in pursu-

ance of an affidavit made by the plaintiff, which attachment is levied on the defendant's land, and the bill alleges that the plaintiff, on his affidavit, as prescribed by law, has obtained from the clerk such order of attachment, which allegation is not denied in the answer, and there is no motion made to quash the attachment or demurrer to the bill, and the court hears the case upon the evidence, and decrees a sale of the land levied upon, this Court will not, on appeal, from said decree, reverse the case for want of jurisdiction in the circuit court. (p. 834).

2. DECREE—*Uncertainty—Erroneous.*

A decree of a circuit court, founded on conflicting and contradictory testimony, will not be disturbed unless plainly erroneous. (p. 835).

Appeal from Circuit Court, Wirt County.

Bill by W. R. McIntosh against the Augusta Oil Company and others. Decree for plaintiff, and the oil company appeals.

Affirmed.

WILLIAM BEARD and T. A. BROWN, for appellant.

LOCKHART & MARTIN, for appellees.

ENGLISH, JUDGE:

W. R. McIntosh and James L. Peebles were in February, 1890, seised and possessed of several tracts of land located in West Virginia, on the waters of Standing Stone creek, in Wirt County, containing in the aggregate nine hundred acres, and on September 5, 1889, the said McIntosh, having control and management of said property, joined with Peebles in leasing said land to one William Skinner, of Pittsburg, Pa., for the purpose of drilling and operating for oil and gas, upon the usual conditions. The lease provided that one well should be completed within six months from the date of the lease, unavoidable accidents excepted, and, on failure to complete operations on a well within such time, said Skinner agreed to pay fifty dollars per annum after the time for the completion of such well. Skinner, having assigned his rights under said lease to the Augusta Oil Company as to thirteen-sixteenths of the same, the said oil company entered into an agreement with said McIntosh to begin and bore a test well on said land, beginning opera-

tions within thirty days from the date of said agreement, and continue boring as rapidly as possible until the stratum known as the "Berea grit" was reached, etc. In the event the said Skinner and Augusta Oil Company should fail or refuse to bore and operate said test well, subject to the conditions aforesaid, within one year from the date of said agreement, then the Augusta Oil Company agreed to pay to said McIntosh and Peebles one thousand dollars as liquidated damages for the breach of covenant, and operate said test well. In pursuance of this agreement the said oil company undertook to drill an oil well on said land, but, being so unfortunate as to get their drilling tools fast in the well, the undertaking was abandoned without further effort to complete the contract. On July 27, 1891, said McIntosh instituted a suit in equity against the Augusta Oil Company, James L. Peebles, William Skinner, and H. W. Hartman, trustee, filing his bill at the August rules following, in which he stated the facts above detailed, and prayed for a decree against said oil company for the sum of one thousand dollars for said liquidated and agreed damages. McIntosh also filed an affidavit in said suit for an order of attachment, stating as the sole ground for such attachment that the defendant oil company was a corporation, created and existing under the laws of West Virginia, but that no person could be found upon whom service of process could be made otherwise than by publication; and that the said oil company owns property and estate in said county of Wirt. In pursuance of this affidavit an order of attachment was issued and levied upon certain real estate in Wirt County as the property of said oil company. There was no motion to quash the affidavit or order of attachment, and no demurrer to the plaintiff's bill. The defendant oil company filed its answer, claiming that McIntosh, at the time said contract was entered into, on the 7th of February, 1890, represented to it that he had a good title to said land, and a right to lease the same, when in fact he had not paid the purchase money, and suits were pending for the sale of said land; and that he concealed these facts from it for the purpose of inducing it to enter upon the work of developing said territory, and investing its money in said land; 'that at the time said lease and

agreement were made, the Pennsylvania and West Virginia Lumber Company had instituted suit against the eight hundred acre tract, and a sale of the same had been directed, and that McIntosh had induced respondent to pay off the claim then due the plaintiff in said suit, promising to refund to it the money so advanced, which he failed to do, and it was compelled to have said land sold under the said decree in favor of said lumber company, to whose rights it had been substituted; that by consent and agreement between the defendant company and McIntosh work was discontinued on the well then being drilled on the McIntosh land, and the machinery moved to another lease near his land, and a well put down to a depth sufficient to test the territory; that said McIntosh never refunded the money paid for him, and in the meantime the land was advertised under a trust deed which McIntosh had executed on the same, and defendant was compelled to buy to protect itself,—all of which transpired before the territory could have been developed under said agreement. Depositions were taken, and on May 20, 1898, a decree was rendered in the cause holding that the plaintiff was entitled to the relief prayed for; that the order of attachment be sustained, and that the oil company do pay the plaintiff one thousand one hundred and ninety-seven dollars and five cents, with legal interest thereon from May 20, 1898, until paid, and, in the event the oil company should not, within thirty days, pay the sum of money so decreed, directed a sale of the eight hundred acres attached in the cause upon the terms and in the manner therein prescribed. From this decree the Augusta Oil Company obtained this appeal.

Now, the assignments of error in this case are, to a large extent, based on facts and circumstances which the contending parties sought to establish by the testimony in the case, which seems to be conflicting; and that this Court will not disturb the finding of the circuit court where the evidence is conflicting, unless plainly erroneous, has frequently been held. See *Smith* v. *Yoke*, 27 W. Va. 639; *Bartlett* v. *Cleavenger*, 35 W. Va. 720, (14 S. E. 273); *Richardson* v. *Ralphsnyder*, 40 W. Va. 15, (20 S. E. 854); *Yoke* v. *Shay*, (W. Va.) 34 S. E. 748; and *Spurgin* v. *Spurgin*, (W. Va.) 34 S. E. 750. It is claimed in the assignments of

error that the oil company, by reason of the failure of the title of said McIntosh and the breach of the covenant for quiet enjoyment, could not safely operate said land, but the testimony is undisputed that said oil company left the plaintiff's land, and moved its machinery to the Rathbone land, because that lease was about to expire, and that said company was not prevented from putting down the well on plaintiff's land to the "Berea grit" on account of the liens existing against said land or the enforcement of such liens. It is also claimed as error that the plaintiff should have been compelled to amend his bill because he made an arrangement to compromise his claim for one thousand dollars sued for in the case, because the plaintiff, in his testimony, admits that said oil company is entitled to a credit of two hundred dollars by reason of his portion of the purchase money arising from the sale of part of said land. These facts, however, were known to the oil company, and it neither demurred to the bill nor brought the matter to the attention of the court; and, if it had been brought to the court's attention, it would have been only a credit on plaintiff's claim to that extent, and no cause for amending the bill.

It is next claimed as error that the plaintiff, by his affidavit or bill, does not show any grounds for attachment, and this suit should have been dismissed for want of equity. This assignment is met by the fact that no motion was made to quash the affidavit or attachment in the circuit court, and the plaintiff, in his bill, alleges that upon his affidavit as prescribed by law he has obtained from the clerk of said court an order of attachment against the defendant oil company, which allegation is not controverted in the answer. The question raised as to the validity of the attachment comes too late. In *Kesler* v. *Lapham*, 33 S. E. 289, this Court held that the supreme court will not consider questions not yet acted on by the circuit court; citing *Armstrong* v. *Town of Grafton*, 23 W. Va. 50; *Burke* v. *Adair*, *Id.* 165; *Alderson* v. *Commissioners*, 32 W. Va. 461, (9 S. E. 863); *Bank* v. *Parsons*, 42 W. Va. 137, (24 S. E. 554). We also find the law stated in Drake, Attachm. § 36, as follows: "No advantage can be taken of the defect after verdict, where the defendant appears, and pleads to

the merits;" citing numerous authorities. Now, the record presented for our consideration contains a proceeding by way of attachment in equity, which, so far as any pleading or ruling in the circuit court is concerned, remains unassailed; and, such being the case, the jurisdiction in a court of equity cannot be questioned. I am not unmindful of the fact that this Court held in the case of *Cresap* v. *Kemble*, 26 W. Va. 603, that, "if the court has no jurisdiction, it will dismiss a bill on the hearing, although there was no demurrer to the bill." This is true where, upon the face of the record, it is apparent that jurisdiction is wanting. Not so, however, where the record, on its face, entitles the plaintiff to be heard in a court of equity. In *Miller* v. *White*, 33 S. E. 332, it was held by this Court, that: "Where there is no service of process or appearance, and the seizure of property of defendant is the foundation of jurisdiction, defective or irregular affidavits for attachment, though they might reverse a judgment in the case, for error in departing from the statute, do not make the suit one without jurisdiction, if the court have jurisdiction in cases of that class. A total want of affidavit for attachment in such case would show there was no jurisdiction, but a mere insufficient averment in the affidavit would not," —citing *Cooper* v. *Reynolds*, 10 Wall. 309, 139 L. Ed. 91. In the case at bar we have an affidavit for attachment concerning the validity of which no question was raised in the circuit court. The order of attachment in pursuance of it was issued and levied; and with the allegation in the bill that the plaintiff, upon his affidavit as prescribed by law, has obtained from the clerk of said court an order of attachment, uncontroverted in the answer, the question of equity jurisdiction must be regarded as settled in this case. The decree complained of is affirmed.

Affirmed.

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CHARLESTON.

STILES v. LAUREL FORK OIL AND COAL CO. *et al.*

Submitted February 7, 1900—Decided April 14, 1900.

1. ADMINISTRATOR—*Claim Barred—Renewal.*
An administrator cannot, by the acknowledgment in pleading of a debt against his decedent which is barred by the statute of limitations, or in any other way, remove the bar of that statute. (p. 842).

2. ACKNOWLEDGMENT IN WRITING—*Renewal.*
An acknowledgment in writing, to operate as a new promise to remove the bar of the statute of limitations, must be a clear and definite acknowledgment of a precise sum, plainly importing a willingness and liability to pay, not in any wise conditional, nor by way of compromise or attempt at settlement. (p. 843).

3. CREDITOR'S SUIT—*Set-Off—Plea—Limitation.*
In a suit by a creditor against an expired corporation, where the corporation in its answer pleads a set-off against the plaintiff's demand, the plaintiff may file a plea of the statute of limitations before the commissioner, or in any other manner make that defense before the commissioner taking an account in the case. (p. 843).

4. ACCOUNT—*Acknowledgment—Limitation.*
A stated account, not signed by the party, will not operate as an acknowledgment, to take a demand out of the statute of limitations. (p. 844).

5. BOOK ENTRIES—*No Acknowledgment.*
Mere entries by a party in his own book of accounts will not operate as an acknowledgment, to take a demand out of the statute of limitations. (p. 845).

6. EXPIRED CORPORATION—*Equity.*
There can be no suit against an expired domestic corporation, except one in equity, as provided in sections 57, 59, chapter 53, Code, to wind up its affairs for the benefit of creditors and stockholders. (p. 846).

7 EXPIRED CORPORATION—*Attachment.*
There can be no attachment for debt against an expired domestic corporation. (p. 846).

8. EQUITY SUITS—*Corporation—Creditors.*

In a suit in equity under section 59, chapter 53, Code 1891, by a creditor to assert a debt against an expired domestic corporation, and wind up its affairs, and administer its property for the benefit of creditors, the stockholders are necessary parties; and when a debt is decreed against the corporation, and its property subjected thereto, the decree must both ascertain the debts against the corporation, and declare the shares or interests of the stockholders in the corporation, and in the surplus proceeds of the property decreed to sale. (p. 846).

Appeal from Circuit Court, Wood County.

Suit by Robert G. Stiles against the Laurel Fork Oil and Coal Company and others. Decree for plaintiff, and defendants appeal.

Reversed.

MERRICK & SMITH, for appellants.

V. B. ARCHER, for appellee.

BRANNON, JUDGE:

This is a suit in chancery in the circuit court of Wood County by R. G. Stiles, administrator of W. C. Stiles, Jr., deceased, against the Laurel Fork Oil and Coal Company and others, to assert against the said corporation, which had been dissolved by the expiration of its charter life, a money demand in favor of the estate of W. C. Stiles, Jr., against said corporation for services of Stiles as its general agent, and to sell land of the corporation to pay said demand, which land was levied upon under an attachment in this case, and to wind up the affairs of said corporation, in which suit the court rendered a decree in favor of the plaintiff for a sum of money, and directed a sale of said land to pay the same. Lewis C. Gratz and others, who, as stockholders of said corporation, were parties defendant to the cause, have appealed from said decree.

One of the points made for the appellants is that W. C. Stiles, Jr., was a director in said corporation, and that he, therefore, can maintain no suit for services as such general agent, because section 53, chapter 53, Code, denies compensation for services of a director of a corporation unless it is allowed by stockholders; but it is unnecessary to dis-

cuss this point of law, because Stiles was not a director for the time for which he was allowed by the decree compensation as agent. There are two entries in the proceedings of the directors, simply noting, in stating those present, the presence of Stiles. These date April 30, 1879, and July 14, 1882. It is probable that the presence of Stiles is to be explained on the theory that at one meeting he reported a sale of land, which he would do as general agent, and at the other meeting it is stated that he was indebted to the company, and asked an extension. If these entries in the directors' book stood alone, we might say they show him to be a director; but, the entire record of stockholders and directors being before us, we find that the by-laws authorize three directors, and that at the first meeting of stockholders, in 1869, Lewis Cooper, H. A. Stiles and Thomas Scott were elected directors. They continued to act, and were once or twice subsequently re-elected. Scott having resigned, Henry Bower was elected in his place in January, 1876, (on the 24th of January), and the next day W. C. Styles, Jr., was elected to fill a vacancy. Up to this date there is no appearance of his election, but other people were elected directors and served. In January, 1877, the stockholders elected as directors H. A. Stiles, H. Bower and J. P. Cowperthwait, who accepted and acted as directors thereafter. No other election of directors appears until January, 1894, when Henry Bower, Henry S. Gratz and Lewis C. Gratz, were elected directors. Thus, it appears that W. C. Stiles, Jr., was never elected but for one year, and then displaced from the directorship by the election of other directors (a full board) at the close of that year, in January, 1877. It is thus plain that he never was director but for that one year, ending January, 1877. So the record shows. Those entries in the directors' proceedings in 1879 and 1882 of the presence of W. C. Stiles at meetings are thus shown to mean something else.

The next question is, was he the general agent? Evidence shows that he acted as such for the company from 1869, though no regular election of him appears of record until January 22, 1877, when he was elected by name as general agent by the directors. Before that time, however, frequent orders of the stockholders and directors refer to

the reports and other action of a general agent, thus showing that there was a general agent acting all along through those years prior to the formal entry of election, January 22, 1877. One order recognizes him as agent by name. As Stiles is shown to have been elected at that date, any prior election becomes immaterial, except as it bears on the quantum of his compensation, because he was allowed by the court only for five years' service, from January 1, 1892, and during all that time he was in under formal election.

Stiles being thus general agent, the question comes up, is Stiles entitled to any compensation? Clearly, if he acted, he would be entitled to compensation to the extent of the worth of his services; but the commissioner allowed him one hundred dollars a month, upon the theory that the directors had fixed his pay at that amount. The defendant stockholders contest this allowance, saying that it is unreasonable, and that the directors never fixed that compensation. The by-laws provide that the directors should appoint a president, treasurer, and secretary, and also appoint and employ such agents as, in their judgment, the business might require, and fix their compensation. At the first meeting of the directors, in 1869, "Mr. L. Cooper was appointed a committee to fix the salary of the officers, and he reported that he would fix the salaries of the president, secretary, and treasurer at three hundred dollars each per annum, and one hundred dollars per month to General Agent W. C. Stiles, Jr." At a later meeting of the directors, December 24, 1869, Cooper, according to the record, as committee appointed to fix salaries, reported that, in addition to the report made at the last meeting, he "would recommend the payment of one hundred dollars per month to the general agent, and twenty-five dollars per month to his clerk, and asked that the committee be discharged. On motion, the report was accepted, and the committee discharged." So the record of the directors reads. It is contended that this does not show that the directors fixed the agent's pay at one hundred dollars per month. I think it does. We must not exact such formality, exactness, and clearness of expression in the record of the proceedings, in the country, of directors, as is required

of judicial proceedings, when we see the intention. What we must look at is the purpose of the action. Now, first, I say that the first order made Director Cooper an agent to fix the salary, and his action needed no confirmation. His report was not rejected. Secondly, the next order showed, not that the board, in words, approved his report; but it does show that the board accepted it, did not reject it, and beyond doubt, intended to approve it. And the fact that in numerous orders afterwards made by stockholders and directors a general agent is recognized, and his reports and other actions referred to, confirms the position that the above orders of the directors were understood as approving that compensation, because it appears that the directors, with full knowledge that Cooper had fixed the general agent's pay, let him go on in the position and perform its work, with the full belief on the part of Stiles that he was to receive that pay. I think the orders of the directors fix the pay, and, if they did not, the corporation would be barred from denying that compensation by their silence,—by their conduct,—as an estoppel *in pais*.

The appellants complain that the decree did not allow the corporation against the sum charged by the decree in favor of the plaintiff the sum of four thousand five hundred and fifty-three dollars and ninety cents, admitted in the plaintiff's bill, to be due from Stiles' estate to the corporation. This demand accrued more than five years before the suit. The plaintiff, as administrator, when the answer of the company asked the allowance of that set-off, made the defense of the statute of limitations against said demand. The appellants claim that, as the plaintiff's bill admits an indebtedness of that sum to the corporation, it must be allowed. Let us see. The bill, as to this matter, claims that Stiles was entitled to salary as agent, at one thousand two hundred dollars per year, from October, 8, 1870, to October 8, 1896, amounting to thirty-one thousand two hundred dollars, and then says that "during all of said time there was received on account of rents and other sources of revenue from said corporation's property the sum of four thousand five hundred and fifty-three dollars and ninety cents, which, deducted from the gross sum, would leave a net sum of twenty-six thousand six hundred

and forty-six dollars and ten cents due to said W. C. Stiles, Jr., at the time of his death, and now due to the plaintiff, as such administrator." Is this such an acknowledgment as constitutes a new promise to pay the sum? It is not. It is conditional, not an unqualified acknowledgment, equivalent to a promise to pay; for it is only a proposition to allow said sum of four thousand five hundred and fifty-three dollars and ninety cents, provided there should be allowed to the credit of the estate its whole demand of thirty-one thousand two hundred dollars. Section 8, chapter 104, Code, requires that an acknowledgment in writing, to operate as a new promise, must be one "from which a promise of payment may be implied." It must be unconditional, and indicate that the party is actually liable and willing to pay,—unconditionally willing. 13 Am. & Eng. Enc. Law (1st Ed.,) 753. In *Stansburry* v. *Stansburry's Admr's*, 20 W. Va. 23, it is held that: "The burden of removing the bar of the statute by a new promise rests upon the defendants; and an acknowledgment or admission, to have effect, must not only be unqualified in itself, but there must be nothing in the attendant acts or declarations to modify or rebut the inference of willingness to pay which naturally and *prima facie* arises from an unqualified admission. If the acknowledgment be coupled with terms or conditions of any kind, a recovery cannot be had unless they are fulfilled." Another answer to the claim that the bill, by its acknowledgment aforesaid, demands the allowance of said sum, is found in section 9, chapter 104, Code, providing that no acknowledgment or promise by a personal representative of a decedent shall charge his estate, where, without such promise or acknowledgment, the statute would bar it.

Another point made for the appellants against the allowance of the statute of limitations to defeat the demand of said four thousand five hundred and fifty-three dollars and ninety cents is, that the defense of the statute was not properly made. The answer of the defendant corporation asked that said sum be decreed to it against Stiles' estate on the strength of the said acknowledgment in the bill of its being to the credit of the company. The plaintiff, treating this answer as one calling for affirmative relief, be-

cause alleging new matter, filed a special reply, but afterwards withdrew it; and when the case went to a commissioner to report what was due the plaintiff, the plaintiff filed a formal plea of the statute with the commissioner, and afterwards had an entry in court of the filing of the plea, and the case was heard thereon. This was a plea to the answer, and is therefore claimed to be irregular. I suppose that answer is to be regarded as a plea of set-off would be regarded at law,—a cross action. The statute may be at law formally replied to a formal plea of set-off, or, if no formal plea of set-off be filed, but simply an account of specification of set-off, with notice that it will be relied on as such, the statute may be relied on upon the trial without formal plea. It seems to me that, if that answer is to be treated as one calling for affirmative relief, the plea of the statute ought to be regarded as a special reply; but I regard the answer as simply one of defense by way of set-off, not one calling for a special reply. It may be that in such case, between living defendants, the plaintiff would have to amend his bill to set up the statute; but in such a case as this I think the statute can be relied on informally before the commissioner in any mode bringing it to his notice. That plea was such notice. In *Conrad* v. *Buck*, 21 W. Va. 396, it is held that, in a suit in equity for the settlement of an insolvent partnership, one creditor should be allowed to rely on the statute in any proper manner,—for instance, by exceptions to the commissioner's report. In *Woodyard v. Polsley*, 14 W. Va. 211, it is held that in a suit against the estate of a dead man the statute may be relied on before a commissioner, even where it has not been pleaded before the court prior to the order of reference. This is a like case in principle. Thus, I hold that the defense by the administrator of Stiles was sufficiently presented against the demand set up against the estate by the answer of the company.

Another answer to the bar of the statute of limitations made by the corporation is that Stiles, in his lifetime, from time to time, rendered accounts to the company, showing balances due from him as agent, which, as claimed, constituted stated accounts, and were acknowledgments and fresh promises of payment, and therefore repel the statute

of limitations. I shall not consider the question whether these rendered accounts constitute stated accounts, because such discussion would be immaterial, since, if even they are stated accounts, they do not defeat the statute of limitations. They could not so operate in the teeth of the statute, which requires a promise or acknowledgment signed by the party in order to defeat the statute of limitations. 2 Wood, Lim. Act. § 280.

Again, it is said, that a letter dated January 19, 1895, written by Stiles to the president of the corporation, contained this clause, "On my books there is to the credit of the Co. over three thousand nine hundred dollars," and it constitutes a new promise in writing, and meets the demand of the statute which requires a writing to answer the bar of the statute. That would be true if that acknowledgment stood unqualified by other matter contained in that letter, but it is unequivocally otherwise. That letter, instead of being an unconditional admission of a liability of three thousand nine hundred dollars, and an unqualified expression of willingness to pay it, is an expression of readiness, not to pay it, but only to allow it as an abatement from a very much larger amount claimed in that letter as due to Stiles,—an attempt at settlement. The letter says: "I have received several letters regarding the accounts of the Co. which I cannot definitely answer until my compensation is adjusted. On my books there is to the credit of the Co. over three thousand nine hundred dollars; but against this is the unsettled item of compensation for over twenty-five years, during which I have acted for the Co., made its leases, collected its rents, paid its taxes, etc., etc." The letter goes on further to represent and sustain his demand against the company. Under the authorities above quoted, and stated in the discussion of another subject, it is perfectly plain that this letter is no answer at all to the bar of the statute of limitations.

Certain entries in the books of Stiles are also relied upon as admissions against himself, and as defeating the statute of limitations. Entries in a party's book, made by himself, are perhaps admissible evidence; but I need only refer back to authorities above stated to show that mere book entries are not a promise or acknowledgment, to defeat the statute.

The appellants say that it was error to issue and decree upon the attachment in this case, which was levied upon the lands of the corporation, because it had long before the attachment become dissolved by the expiration of its charter, and its assets were therefore distributable for the equal payment of all creditors, under section 59, chapter 53, Code, which makes the property of an expired or dissolved corporation assets for payment of its liabilities first, and the surplus for distribution among the stockholders according to their interests, and consequently no creditor can defeat the design of said statute, of equality among creditors, by the levy of an attachment. I think this is so. By the common law, when a corporation expires, its lands revert to their grantors, its personalty goes to the crown, and debts due to or from it are extinguished. 6 Thomp. Corp. §§ 6718, 7860; *Coulter* v. *Robertson*, 57 Am. Dec. 168. So there was nothing to attach at common law. And upon the expiration of the charter, at common law, all pending suits abated, and no suit could be instituted against it, because, unlike natural persons, it was dead, without heirs or officers for service of process. So it had neither property nor representatives. *May* v. *Bank*, 2 Rob. (Va.) 56; *Rider* v. *Union Factory*, 7 Leigh 154; 9 Am. & Eng. Enc. Law, (2d Ed) 606, 607. Thus, there could be no attachment against it. This unreasonable rule of the common law, leaving the corporation vested with no property to pay debts, and creditors no remedy, was obviated by the good sense of equity jurisprudence, which entertained a suit by a creditor to enforce their demands against the property of the company. 6 Thomp. Corp. § 7860. But, while the common law did not allow any suit after expiration of the charter, our statute (section 59, chapter 53, Code) adopts the principles of courts of equity before its adoption, namely, that for some purposes the corporation still owned its property; that is—First, for the payment of the creditors; and, secondly, for the purpose of giving the residue of assets to the stockholders. This is a radical change from the common law. Further than this statute allows, a defunct corporation cannot be sued. 6 Thomp. Corp. § 7370, says: "After a corporation becomes dissolved, it can neither sue nor be sued, unless the faculty of

suing or being sued is prolonged by statute for the purpose of winding up its affairs." The suit allowed by said Code section has for its mission the winding up of the affairs of a defunct corporation by decreeing upon its assets—First, for payment of its debts; next, for distribution of the surplus among stockholders. But I cannot see how a remedy given simply for closing up a corporation (a remedy for the equal benefit of all creditors) can be made the instrument, by means of an ancillary attachment, of giving one creditor preference over others. However, the matter is not material in this case, though argued, because there is but one creditor. No creditor is complaining, but only stockholders, and they would be second in right to that creditor, without any attachment, by reason of said Code provision. It did not prejudice them. Thus far, I see no error in the decree.

But this brings us to what I consider an error. This suit is, as above stated, and as the bill admits, brought under said section 59 to wind up the defunct corporation and pay the plaintiff's debt. The bill makes the stockholders parties, as it should do, as they are necessary parties. *Styles* v. *Fork Co.*, 45 W. Va. 374, (32 S. E. 227). They are parties, not only because interested in seeing that only proper indebtedness is decreed, but because they have shares in the surplus. The order of reference required the commissioner to report the names of stockholders, and the amounts of their stock. He did so, but the decree does not adjudicate their rights. What share as stockholders have L. C. Gratz, H. S. Gratz, Ella G. Fell, and other stockholders? The decree does not say. It ignores the commissioner's report as to that matter. The stockholders do not know whether the court will decree them an interest or not. They may assume that it will hereafter do so, but do not know. The suit being for the relief of creditors and stockholders both, it should have adjudicated the respective rights of all, just like creditors of a dead man's estate, or lienors against land of a living man. These stockeholders are creditors, in a sense, of the defunct corporation. Its assets are to be sold, and before sale they should know just what their interests in the assets are. If a stockholder knows his interest,—knows

just what it is by final adjudication,—he may buy the property in or bid it up so as to save himself, just like the creditors of a dead man; but, unless he has such data to go upon,—knows not only the debts, but the respective interests of the stockholders, including his own,—he will not do so. It would be error to decree the sale of land of a dead or living man without ascertaining the interest in the same, especially of a dead man whose estate is being finally wound up. We will have to reverse the decree, and remand the cause to the circuit court for a decree allowing the plaintiff's debt, fixing the rights of stockholders in the surplus, and subjecting the assets.

Reversed.

INDEX.

INDICTMENT.

1. Though generally sufficient to charge in an indictment an offense in the words of a statute, yet if this does not sufficiently define the particular wrongful act, and give notice to the defendant of the offense he is required to meet,—the particular criminal act in its essentials—the statute words must be expanded by such specification of the essentials as will define the offense with particularity. *State* v. *Mitchell*, 789.

INFANTS.

1. Where a person is a guardian for infant children, and institutes as their next friend, also, a suit to protect their interest in reference to a trust estate which is being administered by a trustee, which suit is decided adversely to his wards, and a suit brought by said infants, acting by another next friend, to remove him as their next frind, for refusing to appeal the case, the court should exercise great caution in removing such next friend, and be certain that he has violated his duty before removing him. *Kester* v. *Alexander*, 329.
See *Decree*, 4; *Tax Sale*, 1, 2.

INJUNCTION.

1. When a case is heard regularly on a bill and answer (the answer denying the material allegations of the bill) and general replication, exhibits, and upon a motion to dissolve an injunction, in the absence of evidence tending to prove the material allegations of the bill it is error in the court to refuse to dissolve the injunction.
2. It is a general rule not to continue a motion to dissolve an injunction unless from some very great necessity, because the court is always open to grant, and, of course, to reinstate, an injunction whenever it shall appear proper to do so, and because, too, the plaintiff should always be ready to prove his bill. *Hester* v. *Alexander*, 329.
3. It is a general rule not to continue a motion to dissolve an injunction, unless from some very great necessity, because the court is always open to grant, and, of course, to re-instate an injunction whenever it shall appear proper to do so; and because, too, the plaintiff should always be ready to prove his bill
4. When a motion to dissolve an injunction is heard upon bill and answer and affidavits filed, the answer denying the material allegations of the bill, it is not error to consider at the same time, and refuse, a petition for a rule against the defendant for contempt for violation of the injunction order, and to enter such refusal in the same order dissolving the injunction. *Steelsmith* v. *Fisher Oil Co.*, 391.
5. An injunction will not lie against the sale of goods and chat-